SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Macpherson, and Mr. Justice Trevelyan.

RAMDEO AND ANOTHER *v.* POKHIRAM.* 1893 *Sept.* 12.

Set off—Presidency Towns Small Cause Court Act (XV of 1882), section 18, explanation I—"Admitted set off"—Debt—Civil Procedure Code (Act XIV of 1882), section 111—Jurisdiction.

The plaintiffs sued in the Calcutta Court of Small Causes for breach of contract, the damages for which breach amounted to Rs. 2,148, but they deducted from this sum of Rs. 2,148, by way of set off, a sum of Rs. 500 which was due by them to the defendant on account of an entirely different transaction, thereby reducing their claim to Rs. 1,648. The defendant admitted that the Rs. 500 was due to him by the plaintiffs, but did not, either before suit or at the trial, agree to its being set off against the plaintiffs' claim. *Held* by MACPHERSON and TREVELYAN, JJ. (PETHERAM, C.J., dissenting) that the sum of Rs. 500 could not, under explanation I of section 18 of Act XV of 1882, be set off, and that the suit must be dismissed as being beyond the jurisdiction of the Court.

REFERENCE from the Calcutta Court of Small Causes under section 617 of the Code of Civil Procedure.

The following was the order of reference:—

"The plaint in this case is as follows:—That on the 21st April 1892 the plaintiffs sold to the defendants '100,000 E. bags 40 × 29 Porter, 8 shots, weight 1 lb 12 oz., unhemmed, at Rs. 20-10 per 100 bags loose, with option for other sizes as in the contract specified, of any mill's make Soorah, for delivery in two months, May and June 1892.'

2. "That in terms of the contract the plaintiffs tendered to the defendant on the due date in May 1892 (having previously thereto intimated their readiness to deliver the bags in terms of the contract) 50,000 gunny bags, equality 40 × 29 (no option of sizes having been exercised), and demanded from the defendant value of the ... in terms of the contract.

* Small Cause Court Reference No. 5 of 1893, made by A. P. Handley, Esq., Officiating Chief Judge of the Court of Small Causes of Calcutta.

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3. "That in consequence of the defendant's refusal to take delivery of the goods tendered as aforesaid, the plaintiffs have sustained damages to the extent of Rs. 2,148.

4. "That in terms of two other contracts, No. 521, dated the 22nd February 1892, and No. 523, dated the 9th March 1892, the latter being in settlement of the contract of the 22nd February, and the ascertainment of the difference payable to the defendant by the plaintiffs thereunder, the sum of Rs. 500 is still due and owing by the plaintiffs to the defendant for the deliveries due in May and June under the contract of the 22nd February 1892.

5. "That allowing the defendant credit for this sum of Rs. 500 admittedly due to the defendant against the damages payable by them to the plaintiffs as specified in paragraphs 1, 2, and 3, the sum of Rs. 1,648 is still due and owing by the defendant to the plaintiffs, which on demand the plaintiffs have failed to recover.

"The plaintiffs therefore pray for judgment for Rs. 1,648 with all costs incurred.

"At the hearing of this case before me on the 8th August 1893, Mr. Mendes for the defendant admitted the contract sued on, admitted the tender by the plaintiffs as alleged, but denied that the damages were rightly assessed at Rs. 2,148. He also admitted the two contracts Nos. 521 and 523, and admitted that under those two contracts the defendant was entitled to receive from the plaintiffs the sum of Rs. 500, but he denied that the defendant had agreed to allow the plaintiffs to deduct the sum of Rs. 500 from the sum of Rs. 2,148 due to the plaintiffs, and he submitted that the plaintiffs had no right to deduct this sum, and that the suit should be dismissed, being a suit for Rs. 2,148 and beyond the jurisdiction of this Court.

"Babu C. C. Bose, for the plaintiffs, admitted that the deduction of the sum of Rs. 500 had been made without the knowledge and consent of the defendant, but submitted that under section 18, explanation I, of Act XV of 1882 the plaintiffs had a right to deduct this sum, and that the suit was therefore for Rs. 1,648 and within the jurisdiction of this Court.

"Both parties have asked me to refer this point for the opinion of the High Court. The cases of *Walesby* v. *Goulston* (1),

(1) L. R., 1 C. P., 557.

Avards v. *Rhodes* (1), and *Brojendra Nath Dass* v. *The Budge-Budge Jute Mills* (2), were cited and argued before me. It appears to me that the latter case has very little bearing upon the point. In that case a defendant wished to set off a sum of Rs. 2,738-4 arising out of the same transaction against the plaintiff's claim, and it was held that he could not do so, the sum being in excess of this Court's jurisdiction. It was laid down by the High Court that an equitable right of set off exists in this country when both the claims of the plaintiff and that of the defendant arise *out of the same transaction*. In the present case there are three separate contracts made on different dates, and the plaintiffs deduct a sum payable to the defendant under two of them from a sum payable by the defendant to the plaintiffs under the third. The case of *Walesby* v. *Goulston* has been relied on by both the parties to this suit. In that case the plaintiff brought an action for £51 17*s*. 11*d*. in a superior court, the defendant pleaded a set off; the plaintiff admitted the set off of £32 3*s*. 2*d*., and obtained a decree for the balance £19 14*s*. 9*d*., and claimed his costs. It was held that he was entitled to his costs, as the set off had not been admitted before action. Erle, C.J., on page 569 of the report said:—"The 19 and 20 Vic., Cap. 108, section 24, gives the County Court jurisdiction where in any action the debt or demand consists of a balance not exceeding £50 after an admitted set off. I interpret this as meaning a set off which the plaintiff chooses to admit at the time he sues in the County Court. No doubt the present plaintiff might have admitted the set off and issued a plaint in the County Court, but in my opinion he had an option whether he would make the admission or not." At page 570 of the report Erle, C.J., said:—'I think there is great doubt whether the set off can be admitted by one party only, but here the plaintiff himself did not admit the set off before action.' In the above case Erle, C.J., expresses great doubt as to whether a set off can be admitted by one party only. The case of *Avards* v. *Rhodes* seems to have most bearing on this point. There the plaintiff's particulars of demand stated a debt originally of £57, and admitted that the defendant was

(1) 8 Exch., 312; 22 L. J., Exch., 106.
(2) I. L. R., 20 Calc., 527.

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entitled to a set off of £15; it was held that the County Court had no jurisdiction to try the suit.

"I am of opinion that the defendant's contention is a sound one, and that the plaintiffs cannot, without the consent of the defendant, deduct the sum of Rs. 500 from their damages so as to bring the sum within the jurisdiction of this Court. My judgment is contingent on the opinion of the High Court on the following point:—Whether in this suit the plaintiffs are entitled under s. 18, Explanation I, of Act XV of 1882, to deduct from their claim of Rs. 2,148 against the defendant, the sum of Rs. 500 due from them to the defendant under contracts Nos. 521 and 523 respectively, the defendant not consenting to such deduction, but admitting that Rs. 500 is the correct sum due to him from the plaintiffs under the said contracts Nos. 521 and 523?

"If the plaintiffs are entitled to deduct the said sum of Rs. 500, then this Court has jurisdiction to try the suit. If the plaintiffs are not entitled to deduct the said sum, then the suit must be dismissed for want of jurisdiction."

Mr. *T. A. Apear* for the plaintiffs referred to *Percival* v. *Pedley* (1).

Mr. *Acworth* for defendant referred to *Hubbard* v. *Goodley* (2), *Walesby* v. *Goulston* (3), *Awards* v. *Rhodes* (4).

The following judgments were delivered by the Court (PETHERAM, C.J., and MACPHERSON and TREVELYAN, JJ.):—

MACPHERSON, J.—I think the case has been rightly decided, and I would answer the question submitted in the negative.

The amount or value of the subject-matter of the suit is Rs. 2,148 and beyond the jurisdiction of the Court, but the plaintiffs deducting by way of set off a sum of Rs. 500 which was due by them to the defendant on account of a wholly different transaction, reduced their claim to Rs. 1,648. The defendant says that the sum of Rs. 500 is due to him, but he does not agree to its being set off against the plaintiffs' claim. The question is whether the plaintiffs are entitled to set off this sum so as to give the Small Cause Court jurisdiction, or in other words, whether

(1) L. R., 18 Q. B. D., 635.
(2) L. R., 25 Q. B. D., 156.
(3) L. R., 1 C. P., 567.
(4) 8 Exch., 312; 22 L. J., Exch., 106.

there is "a set off admitted by both parties" within the meaning of Explanation I, section 18 of the Small Cause Court Act (XV of 1882).

Clearly the defendant did not before suit or during the trial agree to the set off, but he admitted the debt of Rs. 500, if a person can be properly said to admit a debt which is due to himself. The question then seems to be reduced to this, whether the word "set off" in the section referred to is equivalent to "debt." I know of no authority for holding that it has that meaning, and the words "an admitted set off of any debt or demand claimed or recoverable by the defendant," in the corresponding sections of the County Courts' Acts of 1856 and 1888, certainly do not indicate that the two words mean the same thing. A sum of money due by the plaintiff to the defendant on a transaction independent of the one on which his claim is based is a debt, and a debt may be the subject of a set off. But it only becomes a set off under certain circumstances, one of which seems to be indicated by section 18, which requires that the set off should be admitted by both parties. The right to set off a debt against the plaintiff's demand is with the defendant. If he does not choose to claim the set off he does not forfeit his right to enforce payment of the debt by bringing a separate action. It is beyond controversy that a plaintiff cannot compel a defendant to plead a set off. I think that section 18 of the Small Cause Court Act was not intended to, and does not, extend the jurisdiction of the Small Cause Court so as to enable a plaintiff to prefer in it a disputed claim for a very large amount by setting off against that claim without the defendant's consent a debt which he owes to the defendant on a wholly different account, a debt which if the defendant wished to enforce it, might be the subject of a separate suit.

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Court shall have jurisdiction to try such action." There was a provision to the same effect in the Act of 1856. It is clear that what must be admitted is the set off of a debt or demand, but there has been some discussion in the courts as to whether the words "an admitted set off" meant a set off admitted by both parties.

The Small Cause Court Act in force in this country places it beyond doubt that whatever may be meant by a set off, the admission must be by both parties. In *Walesby* v. *Goulston* (1) the plaintiff brought an action for £51, but recovered judgment for only £19, a set off having been admitted during trial for £32. The question arose whether he was entitled to his costs. Erle, C.J., held that he was entitled, and added: "I think there is great doubt whether a set off can be admitted by one party only, but here plaintiff did not admit it himself before action brought."

In *Percival* v. *Pedley* (2), Mathew and Cave, JJ., overruling Baron Huddleston, held that the words "admitted set off" meant a set off by the plaintiff only. But the words occurred in another section of the Act which allowed the defendant to apply for an order transferring the action for trial in the County Court when the claim "although it originally exceeded £50 is reduced by payment, admitted set off, or otherwise to a sum not exceeding £50."

In *Hubbard* v. *Goodley* (3), Huddleston, B., and Grantham, J., held that the words "an admitted set off" in section 47 meant a set off the existence of which is admitted by both parties and not merely by the plaintiff, and that the County Court had consequently no jurisdiction to try the action which was one for £56 reduced to £42 by a set off allowed in the plaint. The defendant, it is true, disputed the amount of the set off allowed, but the did not turn on that. The substantial question raised the set off having been allowed by the plaintiff, the had jurisdiction to entertain the action. The case was distinguished. These cases being on a t of course exactly in point, but *Walesby* *Goodley* do support the view I take use Court Act, which is that what

(2) L. R., 18 Q. B. D., 635.

3 D., 156.

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must be admitted is a set off of something, and not the same thing which constitutes the set off. *Percival* v. *Pedley* does not conflict with this view, because if the words "by both parties" had followed the words "admitted set off," the decision might have been different.

TREVELYAN, J.—In my opinion from the facts stated by the learned Chief Judge of the Small Cause Court, the suit should be dismissed.

The whole question depends upon the meaning of the words "set off admitted by both parties." The cases cited to us make it clear that the admission must be before the suit. The question remains what must be admitted before suit? One contention is that it is an admission of an ascertained sum of money legally recoverable by the defendant from the plaintiff (see section 111 of the Civil Procedure Code). The other contention is that it is an admission that such a sum has been set off against the plaintiff's claim.

Of these two contentions I think the latter is preferable.

Although one ordinarily speaks of a debtor admitting a debt, it is not usual to speak of the creditor admitting the debt, and therefore it would be straining the meaning of words to say that the section means a debt admitted by both creditor and debtor. On the other hand, without forcing the language of the section, and without putting upon it an interpretation which would give the words other than their ordinary meaning, one might fairly speak of a creditor, as well as a debtor, admitting that a certain sum can properly be set off against a claim. An admission, to some extent, implies a statement against the interest of the party admitting, and if the latter construction be put on the section, the admission is against the interest of each part[illegible] If one admits that his claim is reducable by a certain [illegible] the other to some extent foregoes his right of suit wit[illegible] his cross claim.

I do not think the question is by any m[illegible] this is the construction I would put upo[illegible] that the cases in England have not gon[illegible] necessary in any of them to go so far [illegible] I am aware, anything in any of th[illegible] is, [illegible] correct.

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In *Turner* v. *Berry* (1) Pollock, C.B., speaking of a set off, said: "It is in the nature of a cross action, and you cannot compel a man to set off his claim or accept credit for it against another." These words are cited with approval by Hawkins, J., in *Neale* v. *Clarke* (2). It seems to me that these words are equally applicable whether the debt is or is not admitted by the debtor.

In *Hubbard* v. *Goodley* (3), Huddleston, B., says, with reference to the words "admitted set off" in section 57 of the County Courts Act: "My opinion is that the words mean admitted by both parties—that each party admits there is a set off." As far as I can see, in using these words, Baron Huddleston had in his mind the construction which, as above stated, I prefer. It is true that he was construing an act of which the words were somewhat clearer, namely, "admitted set off of any debt or demand, claimed or recoverable by the defendant from the plaintiff." These words point, not to the admission of the debt, but to the admission of the set off. But the Legislature here, I think, contemplated a similar construction of section 18, for, if you read into that section the provisions of section 111 of the Civil Procedure Code passed in the same year, you get very near to the words of the County Court Act.

I would dismiss this suit with costs including the costs of this reference.

PETHERAM, C.J.—In my opinion the answer to the question submitted for the opinion of this Court should be in the affirmative, but before stating the reason for my opinion I find it necessary to examine a little in detail the circumstances under which the qustion arises, as disclosod in the case prepared by the Chief Judge.

"...ppears that on the 22nd of February 1892 a contract for the ...me goods was made between the plaintiffs and the ...it does not appear, nor is it material, to consider ...or and which the seller. On the 9th of March ...contract by which the seller of the goods ...y them back from him at a different ...he account, after deducting the price

(2) L. R., 4 Exch. D. at p. 296.
(3) B. D. at p. 158.

of the goods at the rate mentioned in one contract from the price at the rate mentioned in the other, a balance of Rs. 500 appeared due from the plaintiffs to the defendant.

On the 21st of April 1892, the plaintiffs by a contract of that date agreed to sell certain other goods to the defendant for delivery in May and June. The goods were not delivered: the plaintiffs allege that the difference between the contract price of the goods and the market price at the time when the defendant had agreed to deliver them is Rs. 2,148, and they bring this suit to recover the sum of Rs. 1,648, that being the sum Rs. 2,148 after deducting from it the Rs. 500 which is due from them to the defendant on the balance of the old account.

There can be no doubt that the debt due from the plaintiffs to the defendant on the balance of the old account is a debt which the defendant is entitled to set off against a claim of this nature under section 111 of the Civil Procedure Code. The suit is a suit for the recovery of money, and the claim of the defendant against the plaintiffs for the amount which appears to be due to him on the balance of the old account is an ascertained sum of money legally recoverable by him from the plaintiffs, and the next question is whether such a balance, so arrived at, is a set off admitted by both parties within the meaning of explanation I of section 18 of the Presidency Small Cause Court Act. A debt due from the plaintiff to the defendant is made a set off by law (section 111, Civil Procedure Code), so that if a debt exists a set off exists, and from this I think that it must follow that if an admitted debt exists an admitted set off exists, inasmuch as a debt and a set off are in law the same thing. I think that a debt admitted by the parties is one claimed by the creditor and admitted by the debtor, and that is precisely the condition of the defendant here.

The parties to the two contracts of the 22nd February 1892 and the 9th of March 1892 have closed them, and the account has been made upon that basis, which it is admitted shows a balance in favour of the defendant: that sum he now claims, and the plaintiff admits that he is entitled to recover it, so that it is a claim made by the defendant and admitted by the plaintiff, which is, I think, a debt admitted by both parties in the strictest sense

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of the word, and if I am right in thinking that the expression "set off" is for the purposes of those sections the equivalent of the word "debt," it must follow that there is a "set off" of Rs. 500 admitted by the parties, and that the Small Cause Court has jurisdiction to entertain the suit.

The wording of the English County Courts Act is slightly different, and consequently the English cases are not direct authorities on the point, but I should add that I cannot reconcile the decision of Huddleston, B., and Grantham, J., in *Hubbard* v. *Goodley* (1), with that of Mathew and Cave, JJ., in *Percival* v. *Pedley* (2), so that there cannot be said to be any current of English decisions in either direction.

The answer of this Court to the question stated is in the negative.

Attorneys for the plaintiffs: *Messrs. Pittar* and *Chick.*

Attorneys for the defendant: *Messrs. Leslie* and *Sons.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

1893 *Aug.* 22.

RADHA MADHUB SANTRA AND OTHERS (DEFENDANTS) *v.* LUKHI NARAIN ROY CHOWDHRY (PLAINTIFF).*

Withdrawal of suit—Civil Procedure Code (Act XIV of 1882), s. 373—Withdrawal of suit without permission to bring fresh suit—Application of the Civil Procedure Code to suits in Revenue Courts.

Section 373 of the Civil Procedure Code (Act XIV of 1882) does not apply to suits before the Revenue authorities under Act X of 1859, that Act being a complete Code in itself.

THE facts of this case were shortly as follows

The plaintiff brought a suit for arrears of rent in the Deputy Collector's Court under Act X of 1859 for the years 1295, 1296 to

* Appeal from Appellate Decree No. 494 of 1892, against the decree of B. L. Gupta, Esq., Judge of Cuttack, dated the 6th January 1892, reversing the decree of Babu Brojo Mohun Roy, Deputy Collector of Cuttack, dated the 15th of September 1891.

(1) L. R. 25 Q. B. D. 156. (2) L. R. 18 Q. B. D. 636.