AITKEN, SPENCE & CO. *v.* (1) THE CEYLON WHARFAGE CO., LTD.; (2) THE BIBBY STEAMSHIP CO., LTD.

D. C., Colombo, 13,768.

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Plaint for recovery of value of lost goods — Doubt of plaintiff as to which of the defendants is liable for such loss — Civil Procedure Code, ss. 14, 15 — Joinder of different defendants — Same cause of action against all.

Where, in an action for the recovery of the value of lost goods, the plaintiff, being doubtful as to which of the defendants was liable for such loss, prayed the Court to determine the question of their liability and then to give judgment against them or either of them. and where the plaintiff alleged that the second defendant company received from the plaintiff in Liverpool 790 bundles of hoop iron for delivery to them at Colombo for freight duly paid, and that the first defendant company, being wharfingers and warehousemen in Colombo, received all or a portion of the said bundles from the second defendant company for delivery to the plaintiff upon payment of the landing charges, but failed to deliver to the plaintiff 107 bundles out of the 790,—

Held, that the cause of action alleged against both the defendant companies was the same, viz., failure through neglect, mistake or wilful default to deliver 107 bundles of hoop iron, and that therefore the plaint should not have been rejected.

AFTER setting out that the defendants are joint stock companies incorporated in England, and that the first defendant company are carrying on business as wharfingers and warehousemen in Colombo, and the second defendant company carry on business in Colombo and elsewhere, the plaint alleged that on or about the 25th October, 1899, the plaintiffs agreed with the second defendant company that, in consideration of the plaintiffs causing to be shipped on board the ss. *Lancashire*, in the port of Liverpool,

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790 bundles of hoop iron marked " A. S. & Co." belonging to the plaintiffs, the second defendant company, by a bill of lading dated 25th October, 1899, promised the plaintiffs to deliver the same to them at Colombo for freight duly paid; that the second defendant company delivered 790 bundles of hoop iron to the first defendant company, as agents of the plaintiffs, to be landed at Colombo and delivered to the plaintiffs upon payment of the usual landing charges therefor, which the plaintiffs have been always ready and willing to pay; that all conditions were fulfilled necessary to entitle the plaintiffs to have the said goods delivered to them, yet 107 bundles were never delivered to them by either of the defendant companies, and they were wholly lost to the plaintiffs to their loss and damage of Rs. 428; that the first defendant company alleged that the second defendant company only delivered to them 683 bundles marked " A. S. & Co.," and 107 bundles not marked, which latter the plaintiffs refused to accept as goods not shipped by them; and the plaintiffs being doubtful as to whether both or only one, and in the latter event which, of the defendant companies is liable for the loss of the said goods, prayed that the Court do determine the same and thereafter give judgment against them or either of them for the said sum of Rs. 428, &c.

The plaint was accepted and summons were served on the defendant companies, whereupon counsel for the second defendant company moved that the plaintiffs be directed to amend their plaint by striking out the name of one or other of the defendants on the ground of misjoinder of parties.

The District Judge held as follows:—

" Under section 14 of the Civil Procedure Code all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action, and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment.

" Here the plaint sets forth two separate and distinct causes of action against two separate defendants.

" The cause of action against the second defendant company is that they did not deliver the hoop iron according to their agreement in the bill of lading.

" The cause of action against the first defendant company is that they, as the agents of the plaintiffs, having received the hoop iron from the second defendant company, did not deliver them to the plaintiffs.

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" Section 14 of our Code is the same as Order XVI., rule 4, of the English Rules, with the words ' in the same cause of action ' added, and the decision in *Thompson v. The London County Council, L. R. 12 B. 840 (1897)*, applies.

" The plaintiffs must allege against which defendant they will proceed. The name of the other defendant should be struck out and the plaint amended.

" The plaintiffs to pay both defendants the costs of the discussion."

Plaintiffs appealed.

H. J. C. Pereira, for appellants.—The cause of action against either defendant is the same, namely, non-delivery of the hoop iron. The procedure adopted in this case is justified by the Procedure Code, section 15, which is similar to rule 6 of Order XVI. of the English Rules and Orders. The case of the *Honduras Inter-Oceanic Railway Company v. Lefevre & Tucker, L. R. 2 Exch. 1876-1877, p. 301*, is on all fours with the present case. The case of *Madan Mohun Lal v. Holloway, Indian Law Reports 13, Calcutta Series, p. 555*, is also in point.

De Saram, for the first defendant company, respondent.—The cause of action is not the same. In the case of the Bibby Steamship Company (the second defendant) the cause of action is on the bill of lading and the failure to deliver the hoop iron according to certain marks, but in the case of the Wharfage Company (first defendants) it is an action for non-delivery without any liability on their part to deliver according to marks. There is no provision in our Code similar to rule 7 of Order XVI. of the English Rules and Orders. Rule 7 provides that, where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants in order that the question as to which, if any, of the defendants is liable, and to what extent may be determined between the parties. Our Code makes no such provision. Order XVI., rule 4, is similar to section 14 of our Code, but with this material difference: Under our section the words " in the same cause of action " are added, while these words do not appear in the English Rules and Orders. In *Sadler v. The Great Western Railway Company, 1896, A. C. 450*, it was held that a claim for damages against two or more defendants in respect of their several liability for separate torts could not be combined in one action. This was followed in *Gower v. Coulbridge, 1898, 1. Q. B. 348.* In *Thompson v. The London County Council, 1 Q. B. 480*, Collins, L.J., at p. 844, said: " An argument was presented to us,

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" which, it appears to me, was based upon a fallacy—that was " that, because the plaintiffs had claimed only one damage, " therefore their cause of action was necessarily one also, however " many persons they chose to put on the writ as bringing about " that one damage. It seems to me that that is no test at all. The " damage is one thing, the *injuria* is another. What constitutes " the cause of action is the *injuria*, the wrong done by a separate " tort-feasor..... The damage is one, but the causes of action " which have led to that damage are two, committed by two " distinct personalities." It is submitted that this can be applied to the present case. The Acting District Judge was therefore right in ordering the plaintiffs to select against which defendant they would proceed.

C. Brooke Elliott, for second defendant company, respondent.—The English cases cited for the appellants do not apply, for the words " in respect of the same cause of action " are found in section 14 of the Civil Procedure Code, but are omitted in Order XVI., rule 14, of the English Rules. In *Honduras Railway v. Tucker (1877), 2 Ex. Div. 305*, the Court imported the words " in respect of the same cause of action " into the rule; but in the latter case of *Child v. Stenning, 5 Ch. D. 695*, the rule was construed to embrace cases in which the cause of action was not the same, and that is now the English practice, which clearly cannot obtain here. In the corresponding section of the Indian Code, section 28, the words are " in respect of the same matter." O'Kinealy, in his Commentary on this section, says " that the power to join persons as " defendants is not so wide in India as under the English " procedure, and the section was so construed in *Narsing Das v.* " *Mangal Dubey, I. L. R. 5 All. 166.*" The Indian rule is further restricted in practice by section 45 of the Code, which, except in a few cases, forbids the joinder of distinct causes of action, and the Ceylon Code has the same provision in section 36. The Indian Legislature has in several ways shown that it did not intend to introduce there the wide latitude as to the joinder of parties which is allowed in the English Courts; for example, no provisions are enacted corresponding to rules 48 to 55 of the Order dealing with third party procedure. The reason no doubt was that the complicated English procedure was unsuited to India, where in many instances the judges are not trained lawyers, and simpler procedure was therefore desirable. These considerations apply with still greater force to Ceylon.

In our Code the words are " in respect of the same cause of action," and it is submitted that the word " matter " in the Indian Code is a more comprehensive term than cause of action.

Section 5 of our Code defines " cause of action " as being " the " wrong for the prevention or redress of which an action may be " brought, and includes the denial of a right, the refusal to fulfil " an obligation, the neglect to perform a duty, and the infliction " of an affirmative injury." Here the injury by the second defendant company is a supposed wrongful delivery of the hoop iron at the ship's side to the plaintiff's agents. And the injury as against the first defendant company is an omission to deliver the right hoop iron at the warehouse some days later. Possibly the mere *damnum* is the same, but the *injuria* is quite different, and in the definition of cause of action the " affirmative injury " must mean *injuria*. Therefore different causes of action against different defendants separately have been joined here, for which procedure there is no sanction in our Code.

H. J. C. Pereira, in reply.—The plaintiffs can sue the defendants in the alternative. The cause of action is the *damnum*—that is, the damage sustained; one of the defendants must pay the *damnum*. *Injuria* is the real cause of action: it is the non-delivery of the hoop iron. There is the contract, the breach of it, and the resulting damage. The breach is the *injuria*. The contract must not be confounded with the cause of action.

Cur. adv. vult.

17th October, 1900. MONCREIFF, J.—

On or about the 25th October, 1899, the Bibby Steamship Company contracted to carry for the plaintiffs from Liverpool to Colombo and there deliver to the plaintiffs 790 bundles of hoop iron marked " A. S. & Co." In due course the ss. *Lancashire*, upon which the goods were to be carried, arrived at Colombo, and the Bibby Steamship Company delivered 790 bundles of hoop iron to the Ceylon Wharfage Company, who as agents of the plaintiff took delivery of the goods, as they say, and handed them over to the plaintiffs. On receiving the goods the plaintiffs discovered—at least so they say—that 107 bundles out of the consignment were not their goods and were not marked " A. S. & Co." Thereupon they sued the Bibby Steamship Company and the Ceylon Wharfage Company, both together and in the alternative, for damages (which they assess at Rs. 428), interest, and costs. Upon that the defendants moved the District Court that the plaintiffs should be ordered to strike out the name of one or other of the defendants on the ground of misjoinder of parties. To this the District Judge assented, holding that the plaintiffs must elect between the defendants, and that the name of the party for whom they do not elect should be struck out of the case.

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He also ordered the plaintiffs to pay the costs of discussion of both defendants. From this order the plaintiffs appealed.

I do not propose to travel into the English and Indian practices, because, however much it may instruct us, we have a definition of " cause of action " in our Civil Procedure Code, to which we must ultimately come back for the decision of this point. If the claim of the plaintiffs is not founded in each case on the same cause of action (as interpreted in the 5th section of the Civil Procedure Code), the judge was right; if it is, then the judge was wrong.

The first clause of section 14 of the Civil Procedure Code runs thus:—" All persons may be joined as defendants against whom " the right to any relief is alleged to exist—whether jointly, " severally, or in the alternative—in respect of the same cause of " action." The 5th section defines " cause of action " to be " the " wrong for the prevention or redress of which an action may be " brought, and includes a denial of a right, the refusal to fulfil " an obligation, the neglect to perform a duty, and the infliction " of an affirmative injury." I must assume that the plaintiffs can prove—what they may possibly fail to prove—that the Ceylon Wharfage Company bound themselves to deliver to the plaintiffs 790 bundles of hoop iron marked " A. S. & Co." upon delivery of the same to them by the Bibby Steamship Company. There seems to be no dispute as to the contract of the Steamship Company to deliver 790 bundles of hoop iron marked " A. S. & Co." Then the question arises—the 107 bundles having disappeared when they were in the custody of either the Steamship Company or the Wharfage Company—does this joint and alternative suit vest in each case upon the same " infliction of an affirmative injury?" The affirmative injury is the same in each case—non-delivery of 107 bundles of hoop iron marked " A. S. & Co." Is the infliction then the same? Granted that the Bibby Steamship Company, through neglect, mistake, or wilful default, failed to deliver 107 of the bundles which they are under contract to deliver to the plaintiffs, or granted that the Ceylon Wharfage Company, having received the 790 bundles from the Steamship Company, from neglect, mistake, or wilful default, made a short delivery, surely the infliction of the injury (non-delivery) is in each case the same. That at least is my opinion. The infliction was the short delivery made to plaintiffs, and I think it is the same infliction, whether it is caused by the Steamship Company delivering over the side of their vessel, or by the Wharfage Company which distributes the wrong goods to its customers. I therefore think that the District Judge's order should be set aside with costs.

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BROWNE, A.J.—

I consider that the authorities cited by Mr. Pereira in argument showed satisfactorily that there is not such a great, if any, difference between the principles which govern the English decisions in questions of the kind now raised before us and those which must obtain here when we have to construe section 14 as expanded by the definition of the term " cause of action." When in England " cause of action " is (as prior to our Civil Procedure Code it was here) " every fact which is material to be proved to enable plaintiff to succeed "—this contract as well as the breach of it—the question of the right to associate different defendants must depend upon whether there is alleged to exist against them " the right to any relief," which I understand to mean any one and the same relief against what proves to be infringements of the same character on plaintiff's rights—those ultimate impacts upon plaintiff's person, purse, or property, to which we here limit our term " cause of action." There will not be this one relief to be obtainable from those who on one side are likely to undermine the wall of my house and they who on the other side affect it absolutely by vibrations from their machinery. But if their acts are or become so associated in the point of their directions against me that the result comes to me as from a unity of their forces, the defendants are no longer mere twins, but Siamese twins, whom, to carry out the principles of minimizing litigation, I not only may, but even ought to, sue together. Incidently in the English decisions there is considered in all discussions respecting associated or alternative claims the question of whether there is the same cause of action against each defendant. In the cases of separate tort-feasors there is not the same cause of action, and joinder is not allowed (*Saddler v. Great Western Railway, A. C. 450; Thompson v. London County Council, Q. B. D. 843*). But in the case of a transaction the inception of which originally was contract, out of which arises the same redress, or as we call it relief, that redress may be simultaneously sought against two persons, albeit " if these had " been separate actions the process would have been different in " the two actions " (*Honduras Railway Company v. Tucker (1877), 2 Exch. Div. 305; Bennett v. The Ilivraith (1896), 2 Q. B. 464*).

Here the right to relief is caused by breach of contract. The question is whether there was but one contract and breach of it, or whether it was fulfilled, and there was breach of another contract which was supplemented to the first. I regard these to

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be much the same as the latter precedent mentioned above, where the question was which of two men made a contract from which redress should be given to the plaintiff for breach by that defaulter of his own obligations. I therefore agree with my brother's view that this triangular duel was legitimately sought and that the order appealed from should be set aside.