Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ledgard and another v. *Bull, and Cross Appeal from the High Court of Judicature for the North-Western Provinces of Bengal; delivered* 21*st July* 1886.

Present:

LORD WATSON.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

These Appeals are taken in an action of damages for the alleged infringement of certain exclusive rights secured to Mr. Bull, the Plaintiff, by three Indian patents; and the whole controversy between the parties depends upon two pleas maintained by the Defendant, the late Mr. Petman, who is now represented by his testamentary executors.

In his written statement, filed in answer to the plaint, before the District Judge of Cawnpore, the Defendant pleaded that the Judge had no jurisdiction to entertain the suit, in respect it had not been regularly brought into Court, and to that plea he has adhered throughout all the subsequent stages of the litigation. The Defendant also pleaded that the Plaintiff had failed to comply with the provisions of Section 34 of the Indian Patent Act, XV. of 1859, inasmuch as no particulars of the breaches complained of had been delivered with the

plaint; and that, in the absence of such particulars, he could not be called upon to state a defence to the action upon its merits.

The District Judge, by an order dated the 2nd March 1882 (the day appointed for adjustment of issues), overruled both pleas, and adjusted issues for the trial of the cause. The first and second issues raised these two pleas; but the Defendant, not being satisfied with the decision of the District Judge, on the 7th March 1882, presented an application to the High Court under Section 622 of the Civil Procedure Code, with the view of obtaining an alteration of the order of the 2nd March, in so far as it related to these pleas. That petition was rejected, as irregular, by the High Court, on the 20th March 1882; and the District Judge then proceeded with the trial of the issues adjusted by him. On the same day on which the Plaintiff's evidence was concluded, the Defendant presented a petition in which he reiterated his pleas, and for the first time stated certain particulars of objections to the validity of the Plaintiff's patents, which he desired to prove. The learned Judge held that the notice of particulars came too late, and negatived the Defendant's right to lead evidence in support of them; and thereafter he found, upon the Plaintiff's evidence, that the alleged infringement had been established, and assessed damages at Rs. 10,000. That sum was fixed, on the footing that it was a fair consideration for the Defendant to pay for a license to use the Plaintiff's inventions; but, in the argument upon these appeals, the Plaintiff's Counsel admitted that the principle of assessment was erroneous, and that the damages due (if any) must be limited to the loss occasioned to the patentee by reason of the Defendant's infringement.

Upon an appeal by the Defendant, the High Court for the North-Western Provinces, con-

sisting of Sir Robert Stuart, C.J., and Tyrrell, J., agreed with the Court below that the Defendant's plea of no jurisdiction was not well founded. They held, however, contrary to the finding of the District Judge, that there had been an entire failure on the part of the Plaintiff to observe the requirements of Section 34 of the Patent Act, and consequently "that the Plaintiff came into Court "without any case which could possibly be "tried." Being of opinion, in these circumstances, that the Plaintiff ought to be allowed another hearing on the merits, the learned Judges directed "that the plaint be amended "and presented in the proper Court, viz., the "principal Court of original jurisdiction in civil "cases at Cawnpore, and that with the plaint "the particulars required by Section 34 be duly "delivered." The costs were ordered to "be "reckoned as costs in the cause."

Their Lordships are of opinion that it is impossible, in any view which can be taken of the Defendant's pleas, to sustain the operative decree of the High Court. It sets aside, or at least ignores, the whole previous proceedings, including the plaint in which the suit originated; and it directs a new and amended plaint to be presented to the Court, which is simply equivalent to directing a new suit to be instituted. Assuming that the Defendant's pleas were rightly disposed of by the High Court, what the Court ought to have done was to give the Plaintiff the alternative of having his suit dismissed, or of withdrawing it, with leave to bring a new action.

Their Lordships are of opinion that the Defendant's plea, founded on Section 34 of the Patent Act, was rightly disposed of by the District Judge. It appears to them that the learned Judges of the High Court have misconstrued the enactments of that section which refer to

the particulars of breaches to be delivered by a Plaintiff complaining of infringement. The sole object of these enactments is to give the Defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information be given in the plaint itself, or in a separate paper. In so far as it relates to particulars of breaches, Sect. 34 of the Indian Act is expressed in substantially the same terms with Sect. 41 of the English Patent Act of 1852 (15 & 16 Vict., c. 83). In Talbot *v.* La Roche (15 C.B., p. 310), which was an action for violation of a patent "for improvements in ob- "taining pictures or representations of objects," the Plaintiff merely alleged that, during a certain period of time and at a certain place, the Defendant had infringed, "by making, using, and "selling pictures and portraits according to the Plaintiffs invention;" and that was held, by the Court of Common Pleas, to be sufficient compliance with Section 41. Chief Justice Jervis, distinguishing between particulars of breaches, and particulars of objection, to be delivered by the Defendant, said in that case (p. 321):— "Under a plea of want of novelty, the Court "require the particulars to condescend upon "the particular instances. But that is very "different from this case, the matter there is "not in the knowledge of the patentee. But "the Defendant must know whether and in "what respects he has been guilty of infringe- "ment." In Needham *v.* Oxley (1 H. and M., 148) the Plaintiff simply pointed to certain machines used by the Defendant, and stated in general terms that they infringed his patent. Lord Hatherley held that sufficient particulars had been delivered, and he accordingly refused the Defendant's motion for an order on the Plaintiff to specify in what respects his machines infringed the patent. There are other autho-

rities to the same affect, but it is unnecessary to refer to them.

In the present case all three of the Plaintiff's patents relate to one article, a kiln for burning bricks, and the second and third in date are for improvements upon the invention specified in the first. The Plaintiff points to a particular kiln constructed and used by the Defendant, and in his plaint he not only refers to his patents, but indicates in the case of each of them the distinctive features of his invention which he alleges to have been appropriated by the Defendant in the construction and use of the kiln. It is therefore impossible to accept the views of the High Court upon this branch of the case without disregarding the authoritative construction which has been put upon the corresponding section of the English Act, a construction which appears to their Lordships to be just and reasonable.

There only remains for consideration the objection stated by the Defendant to the jurisdiction of the Court. The circumstances in which the pleawas taken are these. The plaint was originally filed in the Court of the Subordinate Judge at Cawnpore on the 2nd February 1882, whereas Section 22 of the Act XV. of 1859 provides that no action for infringement "shall be maintained "in any Court other than the principal Court "of original jurisdiction in civil cases within the "local limits of whose jurisdiction the cause of "action shall accrue, or the Defendant shall re-"side as a fixed inhabitant." The principal Court of original jurisdiction was the Court of the District Judge. On the 15th February 1882 the Defendant personally signed, along with the Plaintiff and his pleader, a petition praying the District Judge to withdraw the case from the Court of the Subordinate Judge, and to try the suit in his own Court. On the same day

an order was made in the District Court in these terms :—" That the case be transferred from the " Subordinate Judge's Court to the file of this " Court, and the date will be fixed hereafter." It is admitted that the District Judge had no authority to issue that order unless such authority was given him by Act X. of 1877, Section 25. The suit was entered in the file of the District Court, and has since proceeded as a transferred suit, originally instituted in the Court of the Subordinate Judge.

In the argument addressed to their Lordships it has not been disputed, and it does not appear to admit of doubt, that a suit for infringement could not be completely instituted in the Court of the Subordinate Judge. Section 22 of the Patent Act expressly provides that no such suit shall be maintained before that Court; and the first and an essential step in the maintenance of a suit is its due institution. In the opinion of their Lordships, the transference of the suit to the District Court was equally incompetent. It was decided by the High Court of Calcutta on the 10th June 1880 (*vide* Ind. L. R., Calcutta Series, Vol. 6, p. 30), that the Superior Court cannot make an order of transfer of a case under Section 25 of the Civil Procedure Code, unless the Court from which the transfer is sought to be made has jurisdiction to try it. Having regard to the terms of Section 25, their Lordships entirely approve of that decision. Apart, therefore, from any question of estoppel affecting the Defendant, there was no competent suit depending at the Plaintiff's instance on the 6th April 1882, when the Defendant raised the plea of no jurisdiction in his written statement of defence.

But then it is said that the Defendant must be held, by reason of his conduct in the suit, to have waived all objection to the irregularities of

its institution before his statement of defence was lodged. It is not said that the Defendant has done anything to waive that objection, since it was stated in his written answer to the plaint. On the contrary, he has taken every possible opportunity to insist in it. The result is, that the Defendant must now have the same judgement upon his plea of no jurisdiction which ought to have been given by the District Judge when the plea was first disposed of by him on the 2nd March 1882.

The Defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it, and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit, if it were competently brought, and their Lordships do not doubt that, in such a case, a Defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the Defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. The present case does not come strictly within these authorities, because the Defendant's plea was stated before issue was joined on the merits, and, in reliance on that plea, he objected

to the case being tried, and withheld his objections to the validity of the patent. It is, therefore, necessary to consider the facts from which their Lordships are asked to infer that the Defendant did, in point of fact, waive all objection to the competency of the suit, and engage that the cause should be tried on its merits by the District Judge.

Great stress was laid by the Plaintiff's Counsel upon the terms of a petition prepared by the Defendant's Native pleader, which was filed before the District Judge on the 24th February 1882. It is a singular fact that this petition, now said to be so very important, is one of the documents which neither of the parties considered of sufficient importance to be forwarded along with the other papers in these appeals. But taking the account given of it by the District Judge, it must have been prepared by the Defendant's pleader, before the transference of the suit on the 15th April, with the view of informing the Subordinate Judge that the Defendant was about to leave for England, in consequence of ill health, and moving that Judge to have the cause heard and determined with the least possible delay. The petition states the plea of no jurisdiction in the Subordinate Judge, so that one of the points which the pleader, at the time when it was originally prepared, desired the Subordinate Judge to hear and determine at once was the plea against his own jurisdiction. Accordingly the Plaintiff's argument as to waiver really rests upon the single fact that the Defendant personally concurred with the Plaintiff and his pleader in petitioning the District Judge to transfer the suit, in terms of Section 25 of the Procedure Code. The grounds of that petition had nothing to do with want of jurisdiction in the Lower Court, but were ordinary grounds of convenience, which would justify the removal of

a suit to the Higher Court from the Lower, assuming it to have been properly instituted there. Their Lordships are unable to hold that such a consent to a transfer operates as a waiver of the Defendant's preliminary pleas or of any of his pleas. It is professedly and in substance nothing more than a consent that these pleas shall be disposed of by another than the Subordinate Judge. They are consequently of opinion that the District Judge, instead of repelling, ought to have sustained the Defendant's plea.

Their Lordships regret that, in accordance with the opinion which they have formed, the suit must be dismissed, on the ground that it was not competently brought; but they cannot dispense with the requirements of the Patent Act and Procedure Code, and the result is due to the Plaintiff himself, who has shown no less obstinacy than the Defendant in perilling the issue of the case upon his own views of the law. Nothing would have been easier than for the Plaintiff to obviate the objections to the regularity of the procedure urged by the Defendant in his written statement. On the other hand, the Defendant might, with perfect propriety and without difficulty, have stated his particulars of objections to the Plaintiff's patent, notwithstanding the prejudicial pleas which he was maintaining. If the suit had been competently brought, their Lordships would certainly not have thought it right to indulge the Defendant with a new trial of the cause, and would have given judgement for the Plaintiff, with damages assessed upon a proper principle. As the case stands, they must humbly advise Her Majesty that the judgement of the High Court, except in so far as it recalls the decision of the District Judge, must be reversed, and the suit dismissed, with costs in both Courts below. The

executors of the Defendant, Mr. Petman, will have their costs in the original and cross appeals.