

(1876) 08 CAL CK 0001
In the Calcutta High Court

Kristomonee Dossee

APPELLANT

Vs

Denobundhoo Chowdhry

RESPONDENT

Date of Decision : 14-08-1876

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2

Citation : (1877) ILR (Cal) 153

Hon'ble Judges : Richard Garth, C.J.; Markby, J; Macpherson, J; Kemp, J; Jackson, J

Bench : Full Bench

Judgement

Richard Garth, C.J.—In this case I have the misfortune to differ in opinion from my learned colleagues. The question which we have to decide is, whether the plaintiff in this suit is barred by the judgment in a former suit. It is said that she is so barred by the second Section of the Civil Procedure Code, which enacts "that the Civil Courts shall not take cognizance of any suit brought on a cause of action" which has been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties."

2. Is then the "cause of action" in the present suit the same cause of action which was adjudicated upon in the former suit? This depends upon what is meant by the words "cause of action," and I believe it has never been seriously doubted, either here or in England, that the true meaning of that expression is not the claim itself, as for instance, the money, or goods, or land, which the plaintiff seeks to recover, but the grounds upon which that claim is founded. For authorities upon this point in England, see Jackson v. Spittal ILR 5 C.P. 542 Durham v. Spence ILR 6 Exch. 46 and the cases cited in Day's Common Law Procedure Acts, 47 and following pages. It seems clear from other sections of the Civil Procedure Code, that this is the sense in which the framers of that Act intended to use the phrase. The 7th Section of the Code enacts that "every suit shall include the whole of the claim arising out of the cause of action," treating the claim as one thing, and the cause of action as another, and obviously

meaning this--that if, for example, the plaintiff's claim is Rs. 500 founded upon a bond (the Rs. 500 being his claim, and the bond and the breach of the condition of the bond being his cause of action) he shall not divide his claim, and sue for part of the Rs. 500 in one suit, and for part in another. And so in the case of land, if a man claims an estate upon the ground that he is heir to his father (the estate being his claim, and his title by inheritance being his cause of action), he is not to be allowed to claim a portion of that estate in one suit, and the remainder in another suit.

3. If then the true meaning of the words "cause of action" is the ground upon which the plaintiff's suit is founded in each particular case, it will be found that the rule which is laid down in Section 2 of the CPC is really the same (so far as plaintiffs are concerned), and has the same force and effect as the rule of "res judicata," as it has always been recognized and acted upon in England and in other countries in Europe where the civil law obtains.

4. According to that rule, in order to make an adjudication in one suit a bar to a plaintiff's proceeding in another, it must be shown: 1st, that the parties in both suits are the same; 2ndly, that the thing sought to be recovered is the same; 3rdly, that the grounds upon which the claim is founded are the same; and 4thly, that the character in which the parties sue or are sued is the same. This is the law established in England by a long current of authorities, which will be found collected in the notes to the *The Duchess of Kingston's case* 2 Smith's L.C. 695, et seq. and in 2 Phillips on Evidence, 16th and following pages.

5. The rule of civil law to the same effect, adopted generally by the English as well as the Civil Courts, is thus stated by Vinnius, whom Lord Chancellor Westbury quotes in the case of *Hunter v. Stewart* 31 L.J. Ch. 346 (to which I shall presently refer) as being the best exposition of the civil law upon the subject.

6. "Exceptio rei judicata non aliter agenti obstat, quam si eadem questio inter easdem personas revocetur. Itaque, ita demum nocet, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eademque conditio personarum." It is not enough that the parties and the subject of the suit should be the same, but also that the ground or right upon which the plaintiff's claim is founded should also be substantially the same. By using the word "substantially," I desire to exclude the supposition that a plaintiff may evade the application of the rule, merely by varying his form of pleading, or by describing the subject-matter of his suit, or expressing his rights, in different language. If the self-same question of right or cause of action has been in substance heard and decided between the same parties, no matter what the form or language of the pleadings may be, the decision is conclusive between them. It is especially necessary to bear this last consideration in mind, because I believe it will be found that much apparent contrariety of opinion in the authorities may be explained by a careful attention to this point.

7. Let us now proceed to examine the facts of the present case.

8. In the first suit the plaintiff (a widow) sued to recover certain land which once belonged to her husband, upon the ground that she was his heir. She and her husband had had one child only, a daughter, who was dead, and that daughter's husband was the defendant in the suit; and he claimed the property on the ground that the plaintiff's husband had, in his lifetime, after the daughter's marriage, conveyed it by deed to the daughter, and that he, the defendant, was the daughter's heir. The plaintiff's case was that the deed under which the defendant claimed was a forgery; and the sole question raised and determined in that case was as to the validity of this deed. The deed was found to be genuine, and the plaintiff's suit was consequently dismissed.

9. The plaintiff then brought the present suit, founded upon the fact that the deed, having been held valid, passed the property to the daughter, and that she (the plaintiff), and not the defendant, was her daughter's heir. Whether or no she was right in this, depended upon a doubtful question of Hindu law, which was decided differently by two different Benches of the High Court: Norman and Loch, JJ., deciding first that the daughter's husband was the heir; and Louis Jackson and Mitter, JJ., deciding on review that the mother was the daughter's heir. It should be specially noted that this question, upon which the merits of the second suit entirely depended, was never raised in the first suit. The first suit was to establish the plaintiff's title as heir to her husband, by invalidating the conveyance to the daughter. The second suit was to establish the plaintiff's title as heir to her daughter through the medium of that very deed. It should also be noted, and it will be found extremely important, when we come to examine presently the decisions of the Privy Council, that in these cases the plaintiff had never been in possession of the land in dispute, and that, consequently, she was not suing for any dispossession by the defendant. She was seeking to establish her title to land which she had never possessed, and consequently she was hound, as I conceive, and as I shall explain more at length presently, to state in her plaint what her title was.

10. It is obvious that the only question raised in the second suit was not (in the words of Section 2) heard or determined in the first suit, and that if, under these circumstances, we are compelled to decide this case in the defendant's favour, we shall be depriving the plaintiff of what is manifestly her right. Still, if law and authority oblige us so to decide, we are of course bound by law and authority whatever may be the right of the parties in his particular suit.

11. The defendant contends, as I understand, that the cause of action in both cases was the same, because both suits were to recover the same land, of which the defendant was alleged to be in wrongful possession, and that the fact of the plaintiff in the one suit claiming under a totally different title from that on which she relied in the other suit makes no difference. The justice of this contention seems to me to depend upon the question which I have already discussed, viz., what the cause of action really was, and whether the statement of the plaintiff's

title in each suit formed a material part of her cause of action.

12. The solution of this question will, I think, be materially assisted by a reference to the 26th Section of the Civil Procedure Code, which directs what statements the plaint shall contain. It is to contain the relief sought for, the subject of the claim, and the cause of action (here again treating the cause of action as a different thing from the claim), and then, in the instance given under paragraph 4 of the same section it is said: " If the suit be for an estate, the plaint should ask for possession of the estate, of which the plaintiff was dispossessed by the defendant, on the--day of--or to which the plaintiff became entitled by inheritance or gift, or purchase or otherwise, as the case may be, on or about the--day of--."

13. These instances or examples will be found to comprise two distinct classes of suits: 1st, those which might be the subject of an action of trespass in England, where the plaintiff had been once in possession and has since been wrongfully dispossessed by the defendant, and in which it is unnecessary to state specifically in the plaint the nature of the plaintiff's title, because his possessory right is sufficient to enable him to maintain the suit; and 2ndly, cases where the plaintiff never has been in possession, and where consequently he cannot rely upon his possessory right, but must state the grounds or title upon which his claim is founded, as by purchase, or by gift, or by inheritance, as the case may be. In these cases, a plaintiff could not have sued in trespass in England, nor could he have relied upon his possessory title, because he never had a possession see *Litchfield v. Ready* 5 Exch. 939 *Turner v. Cameron's Steam Coal Company* 5 Exch. 932 and the cases cited in *Bullen and Leake*, 359 and consequently the Code requires, as I read it, that in these cases the plaintiff shall state what his ground of claim is, and that ground of claim, whether it be by right of inheritance or purchase, or otherwise, forms his cause of action, and is a material portion of the plaint. It seems difficult to explain the 26th Section of the Code and the examples which are given in any other way.

14. In this case, therefore, the plaintiff, never having been in possession of the land in question, was bound to state her ground of claim to it, and she did so in the first suit by claiming as heir to her husband. Having made her claim on this ground, if at the trial she had proceeded upon some other ground, as, for instance that she had purchased the estate from a stranger, the Court, in my opinion, ought to have refused to hear her upon it, because she would then have been proceeding upon a cause of action materially different from that disclosed in the plaint, and which the defendant did not come to trial prepared to contest. If, therefore, the plaintiff's title as heir to her husband was her cause of action in the first suit, how can it possibly be said that the second suit, which was founded on an entirely different title, viz., as heir to his daughter, upon a different state of facts, was upon the same cause of action as the first.

15. But then it is further argued by the defendant, that if the cause of action in the second suit was not included in the first, it ought to have been; and that the

plaintiff was bound to bring forward in her plaint any ground or title upon which she could possibly have claimed the property at the date of the first suit. My answer to this contention is, that there is no law that I know of which obliges the plaintiff to do this; and that, in the absence of any such law, the Court has no right or power to impose such an obligation upon a suitor.

16. The 2nd Section of the CPC does not lay down any rule of the kind, unless indeed the words "cause of action" are intended to have a very different meaning from that which I attribute to them. If in every case where land is sought to be recovered, the cause of action is merely that the plaintiff is entitled to possession (no matter by what right he claims, or whether he ever has or has not been previously in possession of it), the defendant's contention may be right. But then it is difficult to see why the 26th Section of the CPC should require the plaintiff to state his title or ground of claim in his plaint. The examples given in Section 26 would seem in the case to be only misleading and superfluous.

17. I have already explained that such is not my view of the section; and if it were the true one, I can see that, in very many instances, it might be productive of great injustice and inconvenience. Suppose, for example, that A sues X to recover land, upon the ground that it belonged to B, and that he, A, is B's son and heir. The answer of X is that A is not the legitimate son of B, and A is defeated upon that ground. A then brings another suit against X, in which he claims a portion of the same property, setting up a will of B, by which he divided the property in equal shares to two illegitimate children, A claiming to be one of those children. The defence is, that A is barred by the adjudication in the former suit. Now, if A was bound to bring forward in the first suit every ground of claim which he had to any part of the property in question, then no doubt he would be barred in the second suit. But surely it would be highly unjust and inconvenient that he should be obliged to set up in one and the same suit two distinctly conflicting claims. The first suit being founded on the contention that he was A's legitimate son, his evidence in that suit would, of course, be directed to that contention. If he were to be compelled in that same suit to bring forward his other claim, and to show by other evidence that he was the illegitimate son mentioned in the will, it is obvious that he would be placed in a most difficult and unfair position. Again take another instance: A brings a suit for land against X, claiming as heir to his father. He is defeated on the ground that the property was his uncle's, and not his father's. At the time this suit was brought, his uncle was in fact dead, though A did not know it. He then brings a suit against X, as heir to his uncle. Is the previous adjudication a bar? If the cause of action in both actions is that A is entitled to the land, no matter how or why, A is, no doubt, barred, because the second Section makes no exception in favour of persons who are not aware of their rights, and Courts of law have no power to import such an exception into the section. If the cause of action in the second suit is really the same as in the first, it is no less the same because the plaintiff when he brought the first suit was not aware of the other title upon which he relied in his second suit. The section says nothing either as to the plaintiff's knowledge of his rights,

or as to the time when those rights accrued, and, therefore, if the defendant's contention is correct, a man who has once brought Ins suit to re-cover an estate and failed, has exhausted his whole cause of action in respect of that estate, not only all his grounds of claim which he may then have, and of which he may not be aware, but also, if the argument of the defendant is right, every other ground of claim to which he may become entitled in the future. It is impossible, as it seems tome, that this can be the real meaning of the section.

18. I now come to deal with the authorities; and I am aware of course that not only in this Court, but in the other High Courts of this country, the question now under consideration has been frequently discussed, and that there are conflicting decisions upon it. So far as this Court is concerned, I consider that those decisions are now under review, and, therefore, with great respect for the authors of them, I shall abstain from noticing more than one or two cases; but I will refer to some other high authorities, which I consider particularly deserving of attention; and more especially, to certain judgments in the Privy Council, which it is said compel us in this instance to decide in favour of the defendant.

19. The first case to which I shall refer is *Chinniya Mudali v. Venkatachella Pillai* 3 Mad. H. C. Rep. 320.

20. In that case the plaintiff sued to sot aside the sale of a village which had been made by his grandfather (so far as concerned his (the plaintiff's) share in that village), upon the ground that the grandfather had made the sale without his (the plaintiff's) consent, and not for any family purposes. One answer to this claim was, that the plaintiff was barred by previous adjudication in another suit. Two other suits had in fact been brought some years before; the first by the plaintiff's father against the father of the defendant, to set aside the same deed, upon the ground that the grandfather, when he made it, was imbecile, and that the sale was without the plaintiff's father's consent. This suit was decided against the then plaintiff on the ground that the grandfather, when he made the deed was not imbecile: and the Judge distinctly refused to decide the case upon any other ground. In 1862 the plaintiff again sued the defendant on the same ground as his father had proceeded, and that suit was dismissed, because it was *res judicata*. It was then contended that the third suit was founded on an entirely different cause of action, not heard or adjudicated upon in either of the former suits, inasmuch as it impugned the validity of the deed, not on account of the imbecility of the grandfather, but on the ground that the sale was without the plaintiff's consent and not for family purposes: and the Court (Scotland, C.J., and Holloway, J.) were of that opinion. They held, that although the Judge in the first of the former suits might have adjudicated upon the subject of the third suit, he advisedly and distinctly refused to do so, and consequently that the cause of action in the third suit had not been heard or adjudicated upon in the first. A very learned judgment was delivered by Scotland, C.J. and Holloway, J. in that case, in which the principles of the law and especially of the civil law upon the subject, are very clearly explained.

21. Another well-known case in England to the same effect was decided by Lord Chancellor Westbury in the year 1808--*Hunter v. Stewart* 31 L.J. Ch. 346. In that case the plaintiff had filed a bill in the Supreme Court of Sydney in the year 1843, claiming to be admitted as a shareholder in a Loan and Banking Company upon certain grounds set forth in the bill, and this suit was decided against him. He subsequently tiled his bill in England to obtain similar relief, but his claim was founded upon different grounds and equities from those upon which he relied in his former suit, although he might, if he had pleased, have relied upon them in that suit. The Lord Chancellor held notwithstanding that the suit was not barred. His Lordship says: "It is indeed true that the case made by the second bill must be taken to have been known to the plaintiff at the time of the institution of the first, and might have been then brought forward; and it may be said, therefore, that it ought not now to be entertained; but I find no authority for this position in civil suits, and no case was cited at the bar, nor have I been able to find any in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief, but stating a different case, giving rise to a different equity." That case has never, as far as I know, been overruled, and it is, undoubtedly, a very strong authority in favour of the present plaintiff.

22. I now come to the cases in the Privy Council, which are said to be at variance with the plaintiff's contention. The first of these is *Srimut Rajah Moottoo Vijaya Raganada Bodha Gooroo v. Katama Natchiar* 11 Moore's I.A. 50. In that case suits had been brought in the year 1832 to recover possession of a zemindary, and one of the principal questions was, whether the zemindary was a divided or an undivided estate; one of the parties (A) claimed under an alleged will of the zemindar last seized. The Courts in this country decided against the validity of the will, and, upon appeal to the Privy Council in 1844, their Lordships considered that the question whether the property was a divided or undivided estate was a very important one, and had not been properly tried; they, therefore, remitted the case to India, giving liberty to the parties to bring a fresh suit for the purpose of trying that question. Fresh suits were, accordingly, brought in this country, and in those suits A again claimed the Zemindary under the alleged will made by the late zemindar; though at the trial lie rested his case rather on the ground of the property being undivided than upon his claim under the will. Upon this suit being appealed to the Privy Council, A's Counsel distinctly and advisedly gave up all claim under the will, admitting that he did not intend to treat it as a will at all, and resting his case entirely upon other grounds. A, being defeated in these suits, instituted a fresh suit in this country for the purpose of establishing the validity of the very will upon which he had founded his claim in both the two former suits, and which he had afterwards expressly renounced by his Counsel in the second suit; and the Courts here field that he was barred by the judgment in the former suit from making this fresh claim. He then appealed to the Privy Council in 1866, and their Lordships decided that as in the former suit the plaintiff had distinctly put forward his claim upon the will, and then abandoned it, the abandonment must be considered as conclusively binding upon

him, as if the Court had actually decided against the validity of the will, and that in attempting again to enforce his claim under the will he was proceeding to enforce a cause of action which had already been put forward in a former suit and disposed of. There is nothing in that decision, as it seems to me, which conflicts in any way with the opinion which I entertain in the present case. The will upon which the plaintiff's suit was founded had been made the actual subject of claim in the previous suit, and it was no less adjudicated upon in that suit, because the plaintiff by his Counsel chose to renounce it.

23. Then comes the very important case of *Woomatara Debia v. Unnopoorna Dassee* 11 B.L.R. 158. In that case certain disputes had arisen in this country between the plaintiff and other persons on the one hand, and the defendants on the other, as to the boundaries of certain parcels of lands: and these disputes became the subject of proceedings (1st) before the Deputy Collector, (2nd) before the Superintendent of Surveys, and lastly, before the Revenue Commissioner, who made an order as to the boundaries, which, as the plaintiff contended, deprived her of upwards of 3,000 bighas of land to which she was entitled. The defendants, accordingly, took possession of this land from the plaintiff, and the plaintiff then brought a regular suit against the defendants to recover it back, alleging that they had dispossessed her of the property. In that suit she described the land of which she had thus been dispossessed as towfir land, and upon the suit being tried the plaintiff was defeated. She then brought another suit to recover the self-same land from the defendants, alleging a dispossession precisely as before, but describing the land in her plaint as belonging to her ancient talook. The Principal Sudder Ameen upon the trial came to the conclusion that the plaintiff was making in substance precisely the same claim as she had made in the former suit, and considered that she was, therefore, barred. The plaintiff then appealed to the High Court, and the appeal was heard by Phear and Hobhouse, JJ. who dismissed it upon the same ground 2 B.L.R. A.C. 102. Phear, J. in his judgment says: "In both suits they sought to recover from the defendants the same land, on the ground that it was wrongfully held from her by the defendants; and the wrong-doing of the defendants was in the one suit the same act or series of acts as in the other." The case then came on before the Privy Council, and was heard in 1872, when their Lordships affirmed the decision of this Court, considering that the case was barred by Section 2 of the Civil Procedure Code. It was argued in that case that the plaintiff, in the first suit, made her claim upon an entirely different title from that which she put forward in the second suit; but their Lordships' judgment, as I understand it, distinctly proceeds upon the ground that the cause of action in that case had nothing to do with title: that she was in fact setting up precisely the same right in the one case as in the other, and that the allegation of diversity of title was merely a shift for the purpose of endeavouring to try the same question over again under another phase. Their Lordships say: "The first question which occurs to their Lordships (upon Section 2 of the Civil Procedure Code) is, what is meant by the cause of action; and, in the present case, they

are clearly of opinion that the cause of action in both suits was the dispossession of the appellant by the fixing of the boundary which is now complained of, and the other proceedings which culminated in the decision of the Judge in the Act IV case." Their Lordships then go on to say: "Nor does it appear to their Lordships necessary to decide whether, in some of the cases put by Mr. Doyne (the Counsel for the plaintiff), where the party was suing entirely under a new and different title, such a distinction as he contended for might not be taken; because here it seems clear to their Lordships that the matter in dispute throughout was the title; of the talookdar of this talook to the land in question, and the possession which she had thereby acquired; and it is perfectly clear upon the proceedings in the earlier suit, that her right in any way to this land was capable of being therein determined. The Court in that suit seems almost to have considered that the title now sued upon had been put forward, and could not prevail; and that, if the talookdar had any title at all, it was by way of towfir. The Court of appeal, proceeding on the admission of the plaintiff that the whole of the originally settled talook was in her possession, and that all she had been dispossessed of was claimed by her only as towfir lands, dealt with that claim; but it is perfectly clear that if the plaintiff had chosen to put forward the other title in the way that I have suggested, the Court could have dealt with the whole question and considered it; that question being in point of fact a mere question of quantity and boundary, and whether the plaintiff was in any way entitled to recover the land sued for from the defendants, who are the defendants also in the present suit."

24. I certainly do not understand from this judgment that their Lordships intended to lay down any rule such as is now contended for by the defendant. Indeed they appear to me to guard themselves most carefully against doing so. That case was precisely one of those which I have already described, which might have been made the subject of an action of trespass in England, and in which it would have been quite sufficient for the plaintiff, under Clause 4, Section 26 of the Civil Procedure Code, to have merely alleged in her plaint that she had been dispossessed of her estate by the defendants, without stating how or by what title she had acquired that estate. Having once been in possession, she was entitled to stand upon her possessory right, and to sue the defendants for a wrongful dispossession; and their Lordships say expressly at the outset of their judgment, that they consider the plaintiff's cause of action in that particular suit to have been her dispossession. That case, therefore, in my opinion, does not govern the present, which, as I have already explained, comes under a different class of suits, in which the plaintiff could not rely upon her possessory right, but was bound to show by what other right or title she claimed the land in dispute.

25. This is in fact one of those very cases, as it seems to me, in which the question to be tried was not dispossession but of substantive title, and which their Lordships in the Privy Council especially except from the operation of their judgment. It is true, that in one passage they appear to adopt the judgment of Phear, J., in the High Court, and Phear, J., does undoubtedly use expressions apparently laying down the rule for which the defendant contends as applicable

to all cases; but I consider that those expressions of Phear, J., oven though confirmed by tins Privy Council, were extra-judicial, or at any rate can only be considered as an authority with reference to the particular case or class of cases which was then sub -judicio.

26. The only other authority which I think it necessary to notice, is that of Kashee Kishore Roy Chowdhry v. Kristo Chunder Sandyal Chowdhry 22 W.R. 464. The plaintiff's in that case had, in a former suit, laid claim to the land in dispute as being an accretion to an estate of theirs called Mouzah Rughoorampore. In that suit they wore defeated; and they then brought a second suit for the same land, describing it as an accretion to another estate called Mouzah Lukhichur, and the Court (Sir R. Couch, C.J., and Ainslie, J.), decided that the plaintiffs were barred. They considered that the case was not distinguishable from that in the Privy Council, Woomatara Debia v. Unnopoorina Dasse 11 B.L.R. 158 to which I have just referred; and I perfectly agree with them. The plaintiff's in that suit were not relying upon a different title from that which they set up in their former suit. In both suits they claimed the land in question as an accretion to other land, which was their undisputed property, and whether they claimed it as an accretion to one estate or another, or to one village or another, or to one field or another, they were in each case claiming it as an accretion to land of which they wore confessedly in possession. The difference between the two suits was merely matter of description, not of title. This case, therefore as it seems to me, is also clearly distinguishable from the present; and the main reason why I notice it is, that the learned Judges in that case appear to have misapprehended an important passage of the very excel Ion t judgment of Holloway, J., in Chinniya Mudali v. Venkatachella Pillai 3 Mad. H.C. Rep. 320 to which I have referred. Sir Richard Couch apparently considers that Holloway, J., was guilty of some inconsistency in quoting as an authority in one passage a doctrine which he distinctly contradicts in another passage, whereas upon reference to the report, pp. 329 and 330, it will be found that Holloway, J., is there taking considerable pains to explain what he calls the untenable position which had been once held by certain of the civilian jurists, viz., that every possible claim to a particular subject-matter is exhausted by that claim having been once agitated. "Holloway, J., then quotes the texts which induced this misconception of the law; and he points out the distinction which was always observed in actions in rem (even during the time when that "untenable position" was upheld by some jurists) between those cases where a plaintiff made his claim without specifying any ground upon which he made it, and other cases where his claim was founded upon some particular title. In the first class of cases he was barred by the judgment from bringing any other suit, in the last class he might always bring a new suit founded on a different title. Hollowly, J., explains how this doctrine of the Roman law, which he shows to be untenable, disappeared in the time of Diocletian, after the abolition of the order of judices, and that since that time the accepted rule of the civil law has always been as he had previously described it in the earlier part of his judgment.

27. As far as I can see, therefore, neither of the decisions in the Privy Council, nor the last authority to which I have alluded in this Court, militate in any degree against the view which I have taken of the present case. That view is supported, as it seems to me, not only by the provisions of the CPC itself, but by a long current of authorities in England, and by the rule of the civil law as laid down by the most eminent jurists. On the other hand, the construction which some of my learned brothers are disposed to put upon the provisions of Section 2, and the review which they take of the law as laid down by the Privy Council, is not only, as I consider, at variance with the highest authorities, but I fear it will be productive in a large number of cases, as it undoubtedly must be in this, of great injustice.

28. The state of the law in India upon the subject of land tenures and inheritance is exceedingly difficult and complicated. It is quite impossible that tins great mass of the people can properly comprehend its details; and it must constantly happen that, until the differences between contending parties have been ventilated and discussed in a Court of law, the litigants themselves are entirely ignorant of what their legal rights and position may be. I do not believe that the Legislature of this country, nor the Lords of the Privy Council, in interpreting the language of the Legislature, ever intended to impose upon a people, who are for the most part uneducated and imperfectly advised, a more stringent rule upon this difficult subject than has obtained for centuries past in civilized Europe.

29. I desire to add that I make these observations with every respect for the views of my learned colleagues, and with sincere regret that there should be any difference of opinion amongst us upon such an important question.

Kemp, J.

30. This case has been referred by the Chief Justice and Mr. Justice Birch with the following question:

Whether a plaintiff who has brought a suit to recover property upon the strength of one title, and has been defeated in that suit, can bring a suit to recover the same property upon the strength of another title, of which he might have availed himself at the time the former suit was brought, but which he did not set up in the plaint then filed?"

31. Another question was referred for our opinion, but as it has been abandoned in argument on the part of the defendant appellant, it is unnecessary to allude to it.

33. The plaintiff, respondent, sues as heiress of her daughter, Parbutty Dassee, claiming three jotes. It appears that the late Anund Narain Sircar, the husband of the plaintiff, a few days after the marriage of his daughter, Parbutty Dassee, with the defendant Denobundhoo, conveyed by deed of gift, dated the 18th of Bysakh, 1262 B.S. to his daughter the three jotes, the subject of the present suit. The donee Parbutty died first, and then the donor, the aforesaid Anund

Narain Sircar. He left a widow, the plaintiff. It is alleged in the plaint that, after the death of Anund Narain and his daughter, the three jotes were held by Denobundhoo, the defendant, who sued for the recovery of the rents thereof. The plaintiff intervened, but was defeated in the rent-suit. She then sued some years--about eight years--after the succession opened out to her, alleging that the deed of gift was a forgery. That suit was for two out of the three jotes, omitting all claim to the third jote situated in Mouzah Doorgapore. In that suit it was held that the deed of gift was valid, and the plaintiff's suit was dismissed. She brings the present suit within a few days of the period of limitation, dating from the death of her daughter Parbutty, claiming the three jotes as heiress to her daughter.

34. The defendant Denobundhoo, the son-in-law, contends that the suit is barred under the statute of limitation; that it is barred u/s 2 of Act VIII of 1859, as also, with reference to jote No. 3 in Mouzah Doorgapore, u/s 7 of Act VIII of 1859, and on the merits, that he and his son by another marriage are, under the Hindu law, the preferential heirs to the estate of Parbutty Dassee.

35. Both the lower Courts have held that the suit of the plaintiff is in time, as it has been instituted within 12 years from the date of the death of Parbutty Dassee; that it is not barred u/s 2 of Act VIII of 1859, or u/s 7 of the same Act, with reference to the claim for possession of the Jote in Doorgapore. On the merits it was held that the plaintiff was the preferential heiress to his daughter's stridhan.

36. I am of opinion that the plaintiff's suit is barred u/s 2 of Act VIII of 1859. Her cause of action in her first suit, and which obliged her to seek the aid of the Court, was that she alleged that she had been wrongfully deprived of possession of land which she was entitled to have. She had to make out a title to possession such as to prevail against the defendant. It is true that the title set up in the present suit is different from the title set up in the former suit; but the cause of action is not, in my opinion, changed within the meaning of Section 2 of Act VIII of 1859. The title she now sues upon was a title which she could have set up in the first suit, as it is admitted that both her husband and her daughter were dead, and had been so for many years when she brought her first suit. If she omitted to put forward her strongest or any title then available to her and within her cognizance, "so much the worse for her," to use the words of Phear, J., in his decision in *Umatara Delia v. Krishna Kamini Dasi* 2 B.L.R. A.C. 102 : S.C. on appeal to P.C. 11 B.L.R. 158, which decision was affirmed by the Privy Council.

37. As to the jote in Doorgapore, it seems clear that the plaintiff cannot, under the provisions of Section 7 of Act VI II of 1859, claim it in the present suit, having omitted to do so in her first suit.

38 I would reverse the decision of the Subordinate Judge and decree the special appeal.

Jackson, J.

39. In my opinion the plaintiff is concluded by the previous decision, on the authority of the Privy Council judgment in *Woomatara Debia v. Unnopoorna Dassee* 2 B.L.R. A.C. 102 : S.C. on appeal to P.C. 11 B.L.R. 158; but I should have been of the same opinion upon other grounds and independently of that authority.

40. This case is not precisely analogous to any of those which have been referred to, and in my opinion there is, strictly speaking, no new title set up by the plaintiff constituting a new cause of action. In the first suit she claimed the property in question as heir of tier deceased husband. Defendant's case was that it was not property left by the deceased husband, but had been given by him in his lifetime to his daughter, the defendant's wife, who at the time of bringing the suit was dead, and that defendant hold it, and was entitled to it as the heir of that daughter, his own wife.

41. Under the procedure before Act VIII of 1859, the plaintiff, in the filing of an answer to this effect, would have been entitled to put in an application, and doubtless would have done so, if she had chosen to contest the point, to the effect that, assuming such gift, then the plaintiff, and not the defendant, was heir to the donee, and so entitled. And therefore the Court, I conceive, would have been bound to try as well the issue of fact as to the deed of gift, as also the further question whether, if the gift was true and valid, the defendant or the plaintiff was heir.

42. Under the Code there is neither answer nor replication, but the parties may fonder issues upon a further allegation, written or oral, and in my opinion it was incumbent on the plaintiff, if she had a claim as heir of her daughter, to ask for an adjudication of it upon the opposite claim being set up by the defendant.

43. The present suit, therefore, has for its purpose the raising of an issue which was triable in the former suit, but which the plaintiff then declined.

44. In the Madras case *Srimut Rajah Moottoo, and c. v. Katama Natchiar* 11 Moore's I.A. 50 decided by the Privy Council, the plaintiff, in a later suit for the same subject-matter, sought to rely upon a will which, by his counsel, he had formally and deliberately abandoned, and Lord Westbury, who as Lord Chancellor had decided *Hunter v. Stewart* 31 L.J. Ch. 346 which case had been referred to in the Court below, said, in delivering judgment: "It is impossible that any such suit should be allowed to proceed. In the first place it is clear upon the former record, that the appellant had then the power of relying on that document as being a valid will, lie in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might first have insisted that it was an undivided property, and that therefore the plaintiff in those suits had no interest therein; and secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely on it as a valid decree in my favour." The alternative case for the plaintiff in this suit appears to me to present no greater difficulties than the suggested alternative

plea for the defendant in the other. It is true that the argument was stronger against the plaintiff" in that case than in the present, because their Lordships considered that there was a want of bond fides in the plaintiff, but that only contributed to the grounds of the decision, and was not the solo or the main ground. The judgment further lays it down that "when a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward." And it seems to me that the same principles would apply with equal force, and certainly with equal reason, to claimants in this country who are seeking to disturb possession. Their Lordships say further on, "the tiling was in issue, and what was in issue must be taken to have been decided by the judgment." Here if the heirship to the daughter was not in issue, it was only not so because the plaintiff would not recite the issue.

45. In *Hunter v. Stewart* 31 L.J. Ch. 346 Lord Westbury said that he could find no authority for the doctrine that in civil suits a case, which was known to the plaintiff when he filed his first bill, could not be entertained as made by the second bill. But that is not the present case; what we have now before us is a question raised by the opponent in the first suit, and not gainsaid then, for which no doubt there is an excellent reason, viz., that if the plaintiff" had met it, he was pretty sure of an adverse decision at least in the lower Court. But a change in the view of the law upon any particular point taken by the highest tribunal in this country is of course no justification for bringing a suit which principle excludes.

46. I think it unnecessary to enter here upon a discussion of what is meant by "a cause of action which has been heard and determined, &c." But it may be observed that the term "cause of action," as cited in Indian courts, is much older than the Civil Procedure Code, for it occurs in many parts of the first regular enactment touching the Civil Courts in Bengal, Regulation III of 1793.

47. I may also remark that the issues which exhaust what is termed (Section 141)[1] the real question, in controversy between the parties, are drawn not so much from the plaint, as from the allegations, written or oral, made by them respectively; and my impression, founded on much consideration of the several provisions of the Code, certainly is that the legislature clearly intended the whole controversy between plaintiff and defendant upon the subject-matter, so far as their knowledge permitted, to be tried out and conclusively decided, subject only to appeal and review of judgment. As to the judgment of the Privy Council in *Woomatara Debia v. Unnopoorina Dassee* 11 B.L.R. 158 if I were satisfied that the decision of their Lordships really rested upon narrower grounds, I should not be much influenced by the terms of general concurrence in the judgment of Phear, J. But I think justly, for the reasons stated by Markby, J., in his judgment, which I had had the advantage of reading, that their Lordships really adopt the whole of Phear, J.'s reasoning, and that their judgment could not otherwise have well been precisely what it was.

48. Finally, I would say that it is extremely difficult to discover real injustice or hardship in any of the supposed cases which are put, and, so far as that argument is entitled to any consideration, that the balance of public convenience is very much, in this country at least, in favour of a stringent rule.

49. I would dismiss the present suit.

Markby, J.

50. In this case one of the questions referred to us, and which we took time to consider, is, whether a plaintiff who has brought a suit to recover property upon the strength of one title can bring a second suit to recover the same property upon the strength of another title of which he might have availed himself at the time the former suit was brought, but which he did not set up in the plaint then filed.

51. I think this question is concluded by authority.

Phear, J.

52. In the case of *Umatara Debia v. Krishna Kamini Dasi* 2 B.L.R. A.C. 102 dealing with a second suit brought to recover possession of property which the plaintiff had failed to recover in a former suit, said "it appears to me that her cause of action was in both suits the same. In both she (the plaintiff) sought to recover from the defendants the same land, on the ground that it was wrongfully withheld from her by them, and the wrong-doing of the defendants was the same act or series of acts in the one case as in the other. It is true that the title to possession on which the plaintiff now relies is different from that which she set up in 1851. But I think the difference in the title put forward does not change the cause of action within the meaning of Section 2 of Act VIII of 1859. The plaintiff's cause of action, that which obliges her to seek the aid of the court of justice, is simply this, namely, that she is, as she alleges, wrongfully deprived by the defendants of the enjoyment by possession of certain lands which she is entitled to have. It is for her at the trial to make out such a title to possession as will prevail against the defendants. If she omits to put forward her strongest title, or her real title, so much the worse for her. The adjudication of the suit determines as between her and the defendants not only the matter of the particular title which she sets up, but the actual right to possession at the date of the plaint by whatever title it might be capable of being then supported." This judgment was concurred in by Sir Charles Hobhouse, the other Judge before whom the appeal to this Court in that case was heard.

53. These broad and general principles had not, I believe, been laid down in this country before. On the other hand, I believe I am justified in saying that in every country in Europe which has adopted the civil law, the matter was settled the other way. The French law on the subject will be found in Pothier, *Traite des Obligations*, Section 895, who gives the following example: "If I being the heir-at-law of the deceased attacked his will as being not genuine or invalid, and on that

ground I claim the inheritance, even should I fail, that will not prevent me from claiming the inheritance on other grounds." For the general modern views upon the subject I may refer to a work recently added to our library, Arndt's Pandekten, Section 116, note 5, where the matter is very clearly and concisely treated. It there appears that the doubt which has been recently started, whether a particular passage in the digest, upon which the practice of modern Europe in this matter is in part founded, has been correctly understood, has had no effect whatsoever in shaking the rule of law hitherto observed, namely, that in a suit brought to recover possession founded upon title, only that title which is put forward is adjudicated upon.

54. All this was pointed out by Holloway, J., in the case of Chinniya Mudali v. Venkatachella Pillai 3 Mad. H.C. Rep. 320 where that learned Judge expresses an opinion upon the general question precisely the opposite to that taken by two Judges of this Court in the case I have referred to. Prior therefore to the Privy Council case, to which I shall hereafter advert, the law in this country was not settled.

55. In England, as is well known, the title to property is tried in a way wholly different from that in which it is usually tried in the continental countries of Europe and in this country. Here, and in most other countries, the suit generally brought is a suit to recover possession founded upon title. In England the suit is either ejectment, which has a special and peculiar history of its own, or trespass; and there is no practical difficulty in trying separately as many titles as a man chooses to put forward.

56. This being the general state of the law which, upon a matter of this kind, the Privy Council no doubt fully considered, their Lordships have, as it appears to me, thought fit deliberately to adopt as the law of this country what I may call the stricter of the two views which have been expressed in the Courts here. The case of Umatara Debia v. Krishna Kamini Dasi 2 B.L.R. A.C 102 above referred to, was carried by the plaintiff on appeal to the Privy Council, and a decision was given, which, in my opinion, has settled the law. Their Lordships, after referring to the terms of the second section of Act VIII of 1859, say, "the first question is what is meant by the cause of action. And in the present case, they are clearly of opinion that the cause of action in both suits was the dispossession of the appellant." It is there shown how that dispossession took place, but the title of the plaintiff is not anywhere alluded to as forming any part of the cause of action. In the subsequent part of the judgment, their Lordships expressly say that they entirely concur with the judgment delivered by Phear, J., in the High Court," and they dismissed the appeal 11 B.L.R. 158.

57. The question has come before this Court once since this decision of the Privy Council was given, and in that case Sir Richard Couoh, referring to this decision and to another decision of the Privy Council in *Srimut Rajah Moottoo Vija Raghanaada v. Katama Natchiar* 11 Moore's I.A. 50 (but which does not appear to me to be so applicable), says that the plaintiff's in the case before him "having

the means in the former suit of proving the title by accretion to Rughoorampore, or by accretion to Lukhedeia, or by accretion to both, they are barred by the judgment in that suit, and cannot bring another setting up a title by accretion to Lukhedeia, and whether the Subordinate Judge put a proper construction upon the plaint or not is not material. If they did set up a title by accretion to Lukhedeia, that has been decided against them. If they did not, they ought to have done it, and having omitted to do it, they cannot do it now"--Kashee Kishore Roy Chowdhry v. Kristo Chunder Sandyal Chowdhry 22 W.R. 464. Sir Richard Couch goes on to refer to the judgment of Holloway, J., in Chinniya Mudali v. Venkatachella Pillai 3 Mad. H.C. Rep. 320 as supporting this view. But (I say it with deference) there seems to have been some misapprehension in Sir Richard Couch's mind as to the effect of that judgment.

58. It does not support the view taken by the late learned Chief Justice; it is precisely the other way. But of course having been delivered before the judgment of the Privy Council, it is of no weight. It has, however, induced me to consider very carefully indeed the decision of the Privy Council, and to see whether their Lordships do really adopt the broad and general rule laid, down by the two learned Judges of this Court.

59. I, therefore, proceed to consider the reasons which have suggested themselves, or which have been suggested to me, why the decision of the Privy Council may be treated as not conclusive upon the question before us.

60. It is said in the first place that, in the case before the Privy Council, the titles put forward in the two suits were not different, and that it was a mere question of "quantity and boundary." Their Lordships, in one part of their judgment, speak of the claim to the land as tow fir, as a claim by gradual squatting and encroachment. That is not generally the meaning of towfir, though the word may have been so used in that case. It is, however, difficult now to say exactly how the plaintiffs case was there put. But this is clear, that the Judges who heard the appeal in this Court had no doubt whatever that the titles were different in the two cases, and the Privy Council say (at p. 167) " with the full knowledge of all the circumstances, she chose to say I admit that I am in possession of all that I was entitled to under the doul, but I claim this land, the whole of it, as towfir land. The contention now is that, although she thought fit to take that course then, she has now a right to fall back upon the other title, and it is with the case so put that their Lordships deal." At any rate, therefore, the Privy Council seemed willing to adopt for the purpose of argument the view taken by this Court that the titles were different.

61. Again, it is said that the cause of action in both the suits under the consideration of the Privy Council was actual dispossession, whereas, in the special appeal now before us, the plaintiff never has been in possession. Possibly that may be so, though it is not very clear. But I confess that I am unable to see any sound distinction upon this ground. The important question is, whether in Section 2 of Act VIII of 1859 the words "cause of action" include the title upon

which the plaintiff relies to recover possession in a suit. I can quite understand it being hold that they did include this. But I cannot understand how they can be interpreted to include the title where the plaintiff is wrongfully put out of possession of land of which he has never had possession, and not to include it when the plaintiff is wrongfully kept out of possession of land of which he has been in possession, Phear, J., carefully words his judgment so as to exclude any such distinction. The Privy Council say nothing to the contrary, and in my opinion it is clear that the suit brought in this country to recover possession upon title, whether there has been dispossession or not, is what is known as a suit in rem, and not a suit in Personam arising upon an obligation ex delicto, or what in England would be called an action of tort,

62. Further, the Privy Council do, no doubt, use these words: "Nor does it appear to their Lordships necessary to decide, whether in some of the cases put by Mr. Doyne, where the party was suing entirely under a new and a different title, such a distinction as lie contended for might not be taken; because here it seems to their Lordships that the matter in dispute throughout was the title of the talookdar of this talook to the land in question, and the possession which she had thereby acquired, and it is perfectly clear upon the proceedings in the earlier suit that her right in any way to this land was capable of being therein determined." The report of the argument in the case does not assist us in discovering what the class of cases is which is here referred to. But I think it is clear that by the words "now and independent title," the Privy Council meant some title which could not have been put forward in the former suit. This must mean a title newly acquired, because it is clear that under our procedure a person may put forward in one and the same suit as many different titles as he likes.

63. It is further said that the Privy Council did not intend to decide anything more in the case under consideration than was decided in the case reported in 11 Moore's Indian Appeals, page 50, from which a passage is quoted. Between the facts of the case reported in the 11th Moore and the facts of the case in the Privy Council now under consideration, there is a vast difference. In the earlier case--Kattama Natchiar's case as it is called--the defendant had deliberately through his Counsel disclaimed all title under a certain document as a will, and insisted that it must be regarded by the Court as not testamentary. It would seem, therefore, that there had been in the earlier suit what was in fact equivalent to a judicial determination of the very claim put forward in the second suit. But Lord Westbury, in giving judgment, put the case upon more general grounds, He laid down this general proposition, that "where a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge, then to bring forward." That passage is quoted in the judgment I am now seeking to interpret, if we were to strike out the words according to his knowledge," the principle there applied to a defendant would be identical with the principle it is now sought to apply to a plaintiff. Probably it was in consequence of these words that the Privy Council recognize that the two cases are not quite identical. Nothing is said

in the more recent case about the knowledge of the plaintiff.

64. There are some passages in the judgment of the Privy Council which refer to admissions made by the plaintiff in the former suit inconsistent with her second case, and the Privy Council also say (p. 168), "the Court in that suit seems almost to have considered that the title now sued upon had been put forward and could not prevail." Of course, if there had been a previous adjudication of this very question, or an admission deliberately made and recorded equivalent to an adjudication, *cadit quastio*; but the Privy Council do not say there had been either the one or the other, as they would assuredly have done, had they intended to place their judgment upon either of these grounds. And if they had intended to confine their judgment to either of those grounds, they would not have expressed their entire concurrence in the judgment of this Court then under appeal.

65. I have considered the matter at this length, both because I feel the importance of the question raised, and because we are not unanimous as to the effect of the Privy Council decision. I confess that I have not been without doubt upon the matter, but, upon the best consideration I can give to the words of their Lordships, and with great difference to those who think otherwise, the conclusion I have come to is that the Privy Council has already determined the question put to us in the negative, and that this Court has no other duty than to follow that decision.

66. Upon the other question referred to us our opinion was expressed during the argument.

Macpherson, J.

67. I also am of opinion that this suit is barred.

68. I think that the question of the defendant's being his wife's heir as regards this property was in fact before the Court (although there may have been no contest about it) in the first suit, and that the decision then given against the plaintiff necessarily contains a decision of the defendant's right, as heir of his deceased wife, to hold the property against the plaintiff. We unfortunately have not before us the actual pleadings and proceedings in the former suit. But there can be no doubt that in that suit the plaintiff took it for granted, and admitted, that the defendant was his wife's heir, so far as this property was concerned.

69. Further, I agree with Markby, J., in thinking that, even if the question was not in any way decided in the former suit, we now are bound to hold, in accordance with the recent decisions of the Privy Council, that it ought to have been raised in the former suit if at all, and that not having been raised then, it cannot be raised in the present suit.

[1] [Section 141: At any time before the decision of the case, the Amendment of issues. Court may amend the issues or frame additional issues on such Additional issues. terms as to it shall seem fit, and all such amendments as may be

necessary for the purpose of determining the real question or controversy between the parties shall be so made]