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sue for the balance due to him, but that he meant to bring another suit for balance of account. He probably hoped that he would get a discovery in the suit for the land, and feared to sue for the balance at that time, as he could not value the claim in any exact manner, but, as the new Stamp Act of 1867 was not then published, he might have sued at an approximate estimate without much additional expense. The question argued yesterday is whether the present claim arises from a different cause of action from that formerly tried for the recovery of the land. The parties are the same and opposed in the same relations, and if the plaintiff could have made any estimate of the money due to him at the time, he could have got his right established at the same time as he recovered the land. It appears from the Joint Judge's finding, No. 42, which was confirmed on Special Appeal by the decree, No. 44, that one principal fact ascertained was that the plaintiff had discharged all the debts which he owed to the defendants as mortgagees in possession; but no issue was framed to ascertain the exact sums due and paid, and the difference between them.

“My reasons for holding that this claim can be separately brought, are the following: The plaintiff, from ignorance, was unable to ask for this particular description of relief, and the came to some extent resembles that of *Sabeerkhan v. Kali Doss Dey (a)*. But the evidence shows that the claim is substantially one for mesne profits wrongfully kept by the defendants, and, therefore, by sec. 10 of Act VIII. of 1859 it is a distinct cause of action.”

The appeal was argued before COUCH, C. J., and NEWTON, J.

Shantaram Narayan for the appellants—The plaintiff has omitted to sue for a portion of his claim in the former suit, and his claim for such portion cannot now be entertained: Act VIII. of 1859 sec. 7. He cannot abandon a ground of claim which was a proper subject of consideration in that suit, and now bring this fresh suit in respect of it: *Udaya*

(a) 1 Calc. W. Rep. Civ. R. 199.

Tevar v. Katama Neehiyar (b). His remedy, if any, was to apply to have the former decree amended (c).

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Ganpatrav Bhaskar for the Respondent. The claim is really a claim for mesne profits received after the mortgagees were no longer entitled to hold the land, the debt being extinguished: it is therefore distinct cause of action: Civil Procedure Code, sec. 10. It has been held by the Calcutta High Court that a suit for redemption does not bar the mortgagor from suing the mortgagee for mesne profits received by the latter between the date of the suit and the execution of the decree; *Baboo Gour K. Singh v. Sahay Fukeer Chund* (d).

COUCH, C. J.—In this case, the plaintiff, who claims under the mortgagor, sues to recover over-payments on account of a mortgage which has been redeemed. We are of opinion that the claim which arose out of the cause of action when the suit for redemption was filed was, that the plaintiff, the mortgagor, was entitled, first, to recover possession of the mortgaged property on the ground that the mortgage had been satisfied out of the rents and profits received by the mortgagees, and, secondly, to get back any sum over-paid; and that, therefore, the first suit should have claimed both possession and the surplus, as required by sec. 7 of the Code of Civil Procedure, which provides that, “every suit shall include the whole of the claim arising out of the cause of action.” The proper decree would then have been to order payment of the surplus, on the ground that the mortgagees were trustees of the mortgagor and that the money in their hands belonged to him.

But the plaintiff, though he believed that there was a surplus, deliberately abstained from making any claim for the sum which might be found due to him. The case therefore clearly comes within the provision of sec. 7 of the Code, that, “if a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or

(b) Mad. H. C. Rep. 131. (c) Fisher on Mortgages, para. 1,602. p. 881 (2nd ed. (d) 7 Cal. Rep. Civ. R. 364.

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omitted shall not afterwards be entertained." Here the plaintiff omitted to include in the first suit the whole of the claim arising out of the cause of action, and, whatever may be the merits of the case, we are bound to give effect to the provision of the law mentioned above, and must reverse the decree of the lower Courts and throw out the plaintiff's claim as barred by sec. 7 of the Code.

Newton, J.—Concurred.

Decrees reversed.