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sues within the period of limitation, unless in that document it is expressly stipulated that he has abandoned his *mirás* right. The decree of the Assistant Judge is reversed, and the case remanded for re-trial on its merits.

The Court reverses the decree of the Acting Assistant Judge, dated 4th of March 1868, and remands the cause for re-trial with reference to the above judgment. Costs to follow final decision.

Note.—It has been found impossible, after the interval of eight years that has elapsed since the delivery of the above judgment, to ascertain all the facts of the case, but from the expressions used in the judgment it would appear that the *razinámá* was not before the Court at the argument of the special appeal, and that the remarks as to the effect of the wording of the *razinámá* may be said to have been extra-judicial. A different opinion as to the effect of the wording of the *razinámá* was expressed in the more recent case, argued and decided directly on this point, of *Tarachand* v. *Lakshman*, reported *supra*, p. 91.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 254 *of* 1872.

1875. August 31.

CHOVA' KARA' (PLAINTIFF) *v.* ISA' BIN KHALIFA (DEFENDANT).

Practice—Pleading—Written statement—Variance between the case set up in the defendant's written statement and that made by him in evidence at the trial—Civil Procedure Code (Act VIII. of 1859*), Section* 123.

Section 123 of the Civil Procedure Code (Act VIII. of 1859) contemplates that a defendant shall, in his written statement, set forth the case he intends to make at the trial.

The rule followed in *Eshenchunder Singh* v. *Shamachurn Bhutto* (11 Moore I. A. 7), *Mohummud Zahoor Ali Khán* v. *Mussamut Thakooranee Rutta Koer* (11 Moore I. A. 468), and *Narainee* v. *Nurrohurry* (Marsh. 70), that a plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith, applies also to the case made on the pleadings by a defendant.

Therefore where the defendant in a suit in ejectment averred in his written statement that the land in dispute was in fact his, but had previously to 1865 been encroached on by the plaintiff, who in 1865 was about to erect a building thereon, and that the defendant then, in order to avoid litigation, compromised the dispute by payment to the plaintiff of a sum of money, and purchased the land, and had since then remained in possession of it,

Held, that the only defence open to the defendant was that of purchase, and that he could not be allowed at the trial to prove a case of continuous user and possession adverse to the plaintiff commencing before 1865.

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THE plaintiff and defendant are owners of two neighbouring houses in Bussara Musjid Lane. Previously to 1870 there was between these two houses a vacant piece of land. In May 1870 the defendant pulled down his old house, and commenced to rebuild it so as to cover the whole of this vacant ground. While the new building was in course of erection, the plaintiff, by a notice dated 21st May 1870, called the attention of the defendant to the fact that a strip of the vacant ground adjacent to the plaintiff's premises was the property of the plaintiff, and called on the defendant to remove his encroachment. The defendant in his reply, dated 23rd May 1870, denied that the plaintiff had any right to the land which he claimed. The plaintiff took no further steps at the time, and the defendant completed his building so as to cover the whole of the vacant ground, and abut directly on to the plaintiff's house. On 1st May 1872 the plaintiff filed this suit in ejectment against the defendant, to recover from him possession of a strip of land, now covered by a portion of the defendant's new house, alleging that such strip of land was the property of the plaintiff, that the defendant had wrongfully entered on the same in May 1870, and had erected a building thereon. The defendant, in his written statement, alleged that the land in dispute was his own, having been purchased by him, that previously to 1865 the plaintiff had encroached upon it, and in 1865 was about to erect a building thereon, when the defendant, in order to avoid litigation, compromised the dispute as to the ownership of this strip of land by paying for the same to the agent of the plaintiff the sum of Rs. 3,250.

The suit was tried by MARRIOTT, J., on 31st August 1875.

Pigot and *Lang* for the plaintiff.

Starling and *Inverarity* for the defendant.

At the hearing of the cause the evidence of the defendant and of his witnesses went to prove a case of continuous user of the land in dispute by the defendant, and the enjoyment by him of possession adverse to the plaintiff, commencing before 1865 and continuing down to the present time.

[MARRIOTT, J :—Will it not be necessary to frame an issue on the question of adverse possession ?]

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Starling asked that the issue might be raised.

Pigot in reply:—Such an issue ought not now to be raised. The case of user and adverse possession is wholly inconsistent with, and contradictory of, the case set up by the defendant on the pleadings. He there sets up a case of purchase, and admits that the plaintiff was in possession in 1865.

The following is that portion of the judgment which disposes of this, the only point of law in the case:—

MARRIOTT, J.:—As I hold that the piece of land in question was purchased by and was the land of the ancestors of the plaintiff, and the defendant admits that the plaintiff represents the original purchaser, it follows that the plaintiff is entitled to a verdict, unless the defendant can show that the plaintiff has ceased to be such owner, and the defendant acquired a title as owner either by purchase or by adverse possession.

The defendant has filed his written statement, in the 1st and 2nd paras. of which he sets out his title to his dwelling-house and the land belonging thereto. In the 3rd para. he says:—"The said premises, when purchased as aforesaid by the defendant, consisted of a building with a compound at the rear thereof, and on the south side of the said compound was a vacant piece of land belonging to the plaintiff, who had also encroached, to the extent of 22½ square yards, on the land of the defendant at the south corner of the said compound of the defendant's premises, and which said encroachment is delineated in green on a plan of the defendant's premises hereto annexed and marked C." The land coloured green on that plan is undoubtedly the land in dispute, and the only meaning to be ascribed to the sentence—"the plaintiff had also encroached, to the extent of 22½ square yards, on the land of the defendant"—is that the plaintiff had unlawfully intruded upon or taken possession of so much land of the defendant. There can be no encroachment without actual possession.

In the 4th para. of the defendant's written statement he says:—"In the year 1865 the plaintiff was about to erect a building on his said vacant piece of land, and also on the said 22½ square yards encroached on by him as aforesaid, when the defendant requested one Chávu Khán Kadri, who was the sole manager or *munim* of the

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plaintiff in Bombay, not to erect any building on the said 22½ square yards which the defendant claimed as his own."

It seems to me that no possible meaning can be ascribed to those 3rd and 4th paras. other than this—that the defendant claimed the 22½ square yards, but that the plaintiff had encroached, *i.e.*, had unlawfully taken possession thereof, and that such unlawful possession existed in 1865, when the plaintiff was about to build.

That being so, there is a distinct admission, by the written statement, of the plaintiff's possession, although unlawful, up to 1865.

The 5th para. of the written statement states that "subsequently the defendant, in order to avoid litigation, compromised the dispute as to the ownership of this 22½ square yards of land by paying Rs. 3,250 to the said Chávu Khán Kadri", who, the para. goes on to state, on receipt thereof executed certain Gujráthi writings.

Thus the defence put forward by the written statement was that the defendant claimed the land in question as his own, but that the plaintiff was in unlawful possession, and that, in order to settle the dispute, the defendant purchased the land from the plaintiff through his agent.

At the trial the case set up was a denial *in toto* of the plaintiff's possession, and proof that the land in question always was in the possession of the defendant and his predecessors in title—in short, a case of adverse possession against the plaintiff.

At the close of the defendant's case Mr. Pigot in reply submitted that, after the defendant's admission by his written statement of the plaintiff's possession, it was not competent for him to set up the case of adverse possession.

I am not aware that such a case has ever been determined.

The 123rd section of the Civil Procedure Code provides that "written statements shall be brief, . . . but each statement shall be confined, as much as possible, to a simple narrative of the facts, which the party, by whom or on whose behalf the written statement is made, believes to be material to the case, and which he believes he will be able to prove if called upon by the Court."

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That section certainly contemplates that a defendant shall, in his written statement, set forth the case he intends to make at the trial.'

In the case of *Eshenchunder Singh* v. *Shamachurn Bhutto*[1], in which the decree of the High Court at Calcutta was founded on an assumed state of facts, contradictory to the case alleged in the plaint, and of the evidence adduced in support of it, and which decree was reversed by the Privy Council, Lord Westbury in giving judgment says:—"This case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made. Unfortunately in the present instance the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the plaint by the plaintiff, and devoid, not only of allegation, but of evidence in support of it;" and, in conclusion, he says:—"Their Lordships are obliged to disapprove of the decision that has been come to by the High Court. They desire to have the rule observed that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from."

I see no reason why these observations should not be equally applicable to a defendant.

Again, in the case of *Mohummud Zahoor Ali Khán* v. *Mussamut Thakooranee Rutta Koer*[2], Sir James Colvile, in giving judgment, says:—"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings."

The same rule was acted on by the High Court of Calcutta in the case of *Narainee Dossee* v. *Nurrohurry Mohonto*[3]

(1) 11 Moore Ind. Ap. 7; see pp. 20 and 24.
(2) 11 Moore Ind. Ap. 468; see p. 473. S. C. 9 W. R. P. C. 9. (3) Marsh. 70.

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These cases certainly show that a plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith, and I do not see why a defendant is not similarly bound.

In the present suit not only is the case of adverse possession not raised by the written statement, but the direct contrary is alleged. The defendant has, in his written statement, solemnly affirmed to be true that very fact which in the witness-box he solemnly affirmed to be untrue, namely, that the plaintiff was in possession in 1865, and that, too, without affecting to give any explanation of the allegations in his written statement, or why his story was altered.

The first object of Courts of Justice is, by assertion on the one side and denial on the other, to bring the parties to issue; that is, to ascertain the point in dispute between them, and upon which they are to go to trial. This was done in early times by the parties orally in open Court in the presence of the Judge; now it is done by means of written pleadings. To allow a defendant, who has affirmed or denied one state of facts by his pleadings, to affirm or deny the direct contrary at the trial, would render pleadings worse than nugatory, and make them but a means of working injustice, and would be but to encourage fraud and perjury.

I hold, therefore, that it was not competent for the defendant to set up at the trial a case of adverse possession against the plaintiff, as being in direct contradiction of his written statement, and I decline to consider the evidence adduced on that point. The only defence open to the defendant is that of purchase, and this he has failed to prove.

[APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* TUKAYA' BIN TAMANA'.

September 14.

Criminal Procedure Code (Act X. of 1872), Sections 220, 314, and 454—Penal Code (Act XLV. of 1860), Sections 457 and 380—Simultaneous conviction of several offences—Sentence.

In a case of conviction of house-breaking by night, in order to commit theft, under Section 457, and theft, under Section 380 of the Indian Penal Code, there may either be one sentence for both offences, or separate sentences for each