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depends, ought to be construed as conveying a right of action, and nothing more. The vendors expressly state that they are out of possession, and that the property is in the hands of a third party, to whom it has been mortgaged, without their authority; and they thereupon empower the purchaser to bring a suit against the person in possession, in order to recover their shares in the land, with mesne profits. What is contemplated appears to be nothing more than the transfer of the right of entry, although (in accordance with what we believe to be the invariable mode of expression in such documents) the vendor professes, in terms, to convey the property itself.

Our reply, therefore, to the reference is that the plaintiff has acquired the same right of action which his vendors had, notwithstanding that the vendors were not in possession at the date of the sale.

On the return of the case to the Division Bench, Melvill and Pinhey, J J., on the 28th April, 1882, reversed the decrees of the Courts below, and remanded the case for the determination of the shares of the different parties in the land in dispute.

Decrees reversed and case remanded.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice.

February 23.

ASHABAI AND ANOTHER (PLAINTIFFS) v. HAJI TYEB HAJI
 RAHIMTULLA AND OTHERS (DEFENDANTS).*

*Practice—Misjoinder—Cause of action—Civil Procedure Code (Act X of 1877),
 Section 44, Rule (b).*

The plaintiffs, who were the widow and daughter of A, sued the executors of the will of A's father (B) for administration and account. There were four distinct subjects of claim in the plaint, viz., (1) the estate of A's great-grandfather, (2) the estate of A's grandfather, (3) the jewels and ornaments which formed the *stridhan* of A's mother which were in A's possession at the time of his death, (4) a sum of Rs. 1,90,000 which it was alleged that B had settled on A at the time of his marriage. Subsequently to the filing of the suit the first plaintiff amended the plaint and claimed the jewels and ornaments, which formed the subject-matter of the third claim, as her own property, alleging that they had been presented to her on the occasion of her marriage. The plaint prayed (1) for a declaration that *

* Suit No. 616 of 1879.

certain portion of the estate in the hands of the first three defendants (the executors of B) had been ancestral property in B's hands, (2) for an account and administration, (3) that the jewels and ornaments should be delivered up.

Held that there was a misjoinder of causes of action, having regard to the provisions of rule (b), section 44 of the Civil Procedure Code (Act X of 1877). Part of the claim in the plaint was to a portion of A's estate, and was founded upon the plaintiffs' alleged right as heir of A. The other portion of the claim in the plaint, viz., that relating to the ornaments, had no reference to A's estate, and was personal to the first plaintiff herself.

THE plaintiffs Ashabai and Emnabai were the widow and infant daughter of one Haji Adam Haji Esmail who died intestate in May, 1878. The first three defendants were the executors of the will of one Haji Esmail Haji Habib, who was the father of Haji Adam Haji Esmail. The fourth defendant Tyeb Haji Joonas was not originally a defendant to the suit, but was subsequently added as a party by an order of Court.

There were four distinct subjects of claim in the plaint—

(1). In respect of the estate of one Haji Joosub Bulladina, the great-grandfather of the said Haji Adam Haji Esmail, which comprised moveable and immoveable property. This property was alleged to have come into the testator's hands as ancestral estate.

(2). In respect of the estate of one Haji Habib Haji Joosub the grandfather of the said Haji Adam Haji Esmail, which was of the value of ten lakhs or thereabouts. This was also alleged to have come to the testator as ancestral property.

(3). In respect of jewels and ornaments of the value of Rs. 75,000, portion of which, it was alleged, formed the *stridhan* of one Jamboobai, the deceased mother of the said Haji Adam Haji Esmail, which, with the remainder thereof, it was alleged had been presented to Haji Adam on his marriage with the first plaintiff. The plaint alleged that the said jewels and ornaments were in the possession of Haji Esmail Haji Habib at the time of his death in September, 1878. In respect of these jewels and ornaments the plaint was amended after it was filed. As amended it contained the following additional clause:—“*The said jewels and ornaments were presents made to the first plaintiff in contemplation of her marriage and on the occasion of her marriage with*

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the said Haji Adam Haji Esmail, and the same were and are the property of the first plaintiff."

(4). In respect of a sum of Rs. 1,90,000 which the said Haji Esmail Haji Habib settled as and for the benefit of the said Haji Adam Haji Esmail shortly after his marriage.

The plaint prayed for a declaration that the share of the estate of Haji Joosub Bulladina (the 'great-grandfather) come to the hands of Haji Esmail Haji Habib and the estate of Haji Habib Haji Joosab (the grandfather) which came to the hands of the said Haji Esmail Haji Habib were ancestral property, and unaffected by his will.

(2). That an account should be taken of the said estates, and the defendants ordered to pay their shares to the plaintiffs.

(3). That the defendants be ordered to deliver up the said jewels and ornaments.

(4). That the estate of Haji Esmail Haji Habib should be administered.

Hon. *F. L. Latham* (Acting Advocate General) and *Inverarity* for plaintiffs.

Starling and *Jardine* for the first three defendants.

Pigot and *Lang* for fourth defendant.

Starling objected.

There is a misjoinder of causes of action having regard to rule (b) of section 44 of the Civil Procedure Code (X of 1877), which provides that no claim against an executor, administrator or heir, as such, shall be joined with claims against him personally, unless the personal claims arise with reference to the estate of which he is executor, administrator or heir.

The plaint was originally filed by the plaintiffs as heirs of Haji Adam against the executors of Haji Esmail. The fourth defendant was added under an order of Court. The first plaintiff then amended the plaint by adding claims in respect of ornaments which she claimed in her own right.

Pigot in support of the objection.

The plaint was originally framed on the supposition that the original gift was to Haji Adam. The amendment has changed

the character of the plaintiff's claim. Here both plaintiffs at first claim the ornaments as representatives of Haji Adam, and then the first plaintiff by amendment claims the ornaments in her own right.

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Latham, contra.—All the claims in the plaint are personal claims. We sue for individual rights, not as heirs. The test is the right of the defendant to set off personal claims against the plaintiff. You must read “heirs” in the section as meaning persons suing as such in a representative capacity, *e. g.*, as holding certificate of heirship. Here we are not described as heirs in the plaint. Refers to rule 5, Order XVII of the English orders. In the Civil Procedure Code “heir” is causelessly added without distinguishing between representative and personal character equally included in the word. This suit is not a suit by the plaintiffs *quá* heirs.

Starling in reply.—An heir never does or can sue purely in a representative capacity. He is always beneficially interested in subject-matter of suit. The word “heir” was inserted in the Act, because in this country heirs and legal representatives can in many cases sue without having obtained letters of administration or any other like authority, and the Legislature intended that the rule which in England applies only to executors and administrators should also apply to cases in which representatives of any kind could sue.

SARGENT, J.—The objection made to this plaint is that it infringes the provisions of rule (b), section 44 of the Civil Procedure Code (Act X of 1877). This section states certain exceptions to the general rule laid down in section 45, which permits a plaintiff, subject to the discretion of the Court, to join several causes of action in the same suit. Rule (b) of section 44 explicitly declares that no claim by a person suing as heir shall be joined with a claim by him personally, except in a certain case. Now, when can it be said that a claim is made by “an heir as such”? Plainly such a claim is made when the plaintiff rests his claim entirely on the allegation that he is the heir of another, and, as such, asserts a right against the defendant. In the present case the first plaintiff claims as heir of Haji Adam to recover part of his estate.

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With this claim, however, is included another claim personal to the first plaintiff herself. Nor does the case fall within the exception, for the one claim is to a portion of Haji Adam's estate; the other has no reference to that estate at all.

It appears to me, therefore, that there is a misjoinder in view of the provision of rule (b) of section 44, and that one of the claims made by the first plaintiff in this plaint must be struck out.

Attorneys for the plaintiffs.—Messrs. *Jefferson, Bhaishanker, and Dinsha.*

Attorneys for the defendant.—Messrs. *Macfarlane and Edgelow* and Messrs. *Payne and Gilbert.*

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

February 28.

SAMAT AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. AMRA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Inheritance—Rule of succession as between relatives of the whole-blood and half-blood—Brothers—Brothers' sons—Collaterals—Practice—Plaintiffs entitled to more than they claim in plaint.

The plaintiffs (along with others not parties to the suit), were relations of the half-blood to the *propositus*, and the defendants were his relations of the whole blood; but, counting from the ancestor, the plaintiffs were sapindas of the fifth degree, and some of the defendants sapindas of the sixth, and the rest sapindas of the seventh degree of the *propositus*.

Held that there not being any special provision in the Mitakshara or the Mayukha in respect of persons of the half-blood other than brothers and their sons, the general rule applies, that the nearest sapinda succeeds in the absence of special local custom to the contrary, and, therefore, the plaintiffs were the heirs of the *propositus* to the exclusion of the defendants or any of them.

The plaintiffs having sued for a smaller share than they were entitled to, the High Court limited its decree to that amount only.

This was an appeal from the decision of A. L. P. Larken, Acting Assistant Judge of Ahmedabad, reversing the decree of the Subordinate Judge (Second Class) of Dhandhuka.

The plaintiffs and the defendants were descendants of one Chella, whose great-great-grandson Lakha Lunvir held a two-anna

* Second Appeal, No. 91 of 1880.