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We must, therefore, reverse the decree of the lower Appellate Court and reject the claim. But as the question of jurisdiction was not raised by the defendants in either of the lower Courts or taken in the memo. of second appeal, and time had consequently to be given for argument, we think it fair to direct that the parties severally pay their own costs throughout.

Decree reversed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.

GUDDAPPA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* TIRKAPPA (ORIGINAL DEFENDANT), RESPONDENT.*

1900. *August* 27.

Res judicata—Civil Procedure Code (Act XIV of 1882), *Sec.* 13, *Expln. II—Different suits for the same land alleging different titles.*

The plaintiffs sued to recover certain land, alleging that on the death of the widow of the former owner they became entitled as reversioners. They had previously sued the defendant for the same land claiming as the surviving members of the joint family to which the former owner belonged. That suit had been dismissed.

Held, that the present suit was barred by the provisions of section 13 of the Civil Procedure Code (Act XIV of 1882).

SECOND appeal from the decision of R. J. C. Lord, District Judge of Dhárwár, reversing the decree of Ráo Sáheb Ezra Reuben, Second Class Subordinate Judge of Háveri.

Suit to recover possession of land. The plaintiffs were first cousins of one Ningappa, who died in 1870 leaving a widow named Chenbasava. She died in 1894 and the plaintiffs took possession of the land in dispute. The defendant Tirkappa was the brother of Chenbasava, and he filed a suit in the Mámlatdár's Court for possession, alleging that his sister Chenbasava had transferred the land to him. The Mámlatdár passed a decree in his favour. The plaintiffs in collusion with the village officers managed to delay the delivery of possession to the defendant and they filed a suit (No. 19 of 1895) in the Subordinate Judge's Court claiming the land as the co-parceners of their cousin Ningappa and

* Second Appeal, No. 198 of 1900.

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praying for the confirmation of their possession and for an injunction ordering the defendant not to obstruct their possession. That suit was dismissed, the defendant proving that plaintiffs and Ningappa were divided, and that they had lived separate for several years. The defendant in the meanwhile executed the Mámlatdár's decree and recovered possession of the property.

The plaintiffs now sued, claiming possession as the nearest reversioners of Ningappa and not as successors in an undivided family.

The defendant pleaded (*inter alia*) that the suit was barred by sections 13 and 43 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge found that the suit was not barred by sections 13 and 43 of the Civil Procedure Code; that the plaintiffs were the first cousins of Ningappa, and as such were his nearest reversionary heirs, and that the transfer set up by the defendant was not proved. He, therefore, allowed the claim.

On appeal by the defendant the Judge reversed the decree, holding that the suit was barred by the plea of *res judicata*.

The plaintiffs preferred a second appeal.

K. H. Kelkar for the appellant (plaintiffs):—The decision of this case depends upon the meaning to be put upon the words 'litigating under the same title' in section 13 of the Civil Procedure Code and the word 'ought' in Explanation II of the section. The plaintiffs sued in their former suit as surviving co-parceners of Ningappa and now they claim the same property as his nearest reversioners. They are not, therefore, litigating under the same title within the meaning of section 13.

[JENKINS, C. J.:—The explanation says that matters which ought to have been in issue must be considered to have been in issue and decided.]

We submit that the explanation says nothing about the decision of the matter in issue—*Kailash Mondul* v. *Baroda Sundari Dasi*[1]. It cannot be said that the plaintiffs ought to have made the second title a ground of claim in the first suit, because the

(1) (1897) 24 Cal., 711.

two titles are dissimilar and inconsistent, and must be supported by different kinds of evidence—*Kameswar Pershad* v. *Rajkumari Ruttan* (1).

[JENKINS, C. J.:—The test is, are the matters in issue in the two suits so dissimilar as to cause confusion?]

In the first suit it was necessary for the plaintiffs to prove the joint character of the property. In the present suit the cause of action is the reversion. As reversioners the plaintiffs became entitled to the property on the death of Ningappa's widow. There is no rule which compels a plaintiff to aver all his titles at one and the same time—*Sheo Ratan Singh* v. *Sheo Sahai Misr*(2); *Konerrav* v. *Gurrav*(3); *Girdhar* v. *Dayabhai*(4).

Narayan G. Chandavarkar, for respondent (defendant):—In both the suits the causes of action were substantially of the same character and the plaintiffs were litigating for the same property. The principle of *res judicata*, therefore, applies—*Srimut Rajah Mocttoo Vijaya* v. *Katama Natchiar*(5); *Jibunti Nath* v. *Shib Nath*(6).

JENKINS, C. J.:—In this case, the sole question for our determination is the applicability of the plea of *res judicata*: the first Court has repelled the plea, while the District Court on appeal has supported it. The plea is based on Suit No. 19 of 1895 commenced by the present plaintiffs against the present defendant, by which they prayed to be confirmed in possession of the land in suit, and for an injunction. In that suit the plaintiffs alleged that they were entitled to the land, and the title they put forward was that, as the sole surviving members of a joint family, they were its owners. This suit was dismissed on the ground that they had failed to establish their title. Having in the meantime been deprived of possession, the plaintiffs have brought this suit for recovery of the same land alleging a title by heirship as distinct from survivorship, and to this claim it is that the plea of *res judicata* is urged as a bar.

The appellant has before us complained of the needlessly strong language of the District Court, and I think with reason:

(1) (1892) 20 Cal., 79.
(2) (1884) 6 All., 358.
(3) (1881) 5 Bom., 589.
(4) (1882) 8 Bom., 174.
(5) (1866) 11 Moo. I. A., 50, 73.
(6) (1882) 8 Cal., 819.

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it added nothing to the case and merely has served, in some measure, as a weapon with which to attack the judgment of which it is a part. The case, however, must be considered and determined apart from the particular remarks to which objection has been taken, and to this I will now proceed.

The point is governed by section 13 of the Civil Procedure Code, the material part of which is as follows:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties.

"*Explanation I.*—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

"*Explanation II.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It comes then to this: was the title by heirship a matter which *might* and *ought* to have been made ground of attack in Suit No. 19 of 1895? for if so, then it shall be deemed to have been a matter directly and substantially in issue in that suit, and, having regard to the result of the former suit, to have been finally heard and determined adversely to the plaintiffs. That I take to be the plain meaning of the words apart from the decisions to which I will later refer.

Now that the plaintiffs *could* in the former suit have alleged, in the alternative, their title as heirs, is conceded: equally, as it appears to me, they ought to have so alleged it. It was forbidden by no rule of pleading; on the contrary, it was necessary for the complete and final disposal of all questions as to the plaintiffs' title. As, however, Mr. Kelkar for the appellants has called to our attention a large number of cases, which, he maintains, place a different interpretation on the words of the section, it is necessary that I should examine them to see how far they really support his argument.

First I will take the decisions of the Privy Council and of this Court, for they alone are binding on us: and then I will pass to the decisions of the other Courts. The only Privy Council case to which Mr. Kelkar in support of his appeal has called

our attention, is *Kameswar Pershad* v. *Rajkumari Ruttan*[1]; but I fail to see how it assists him, for in that case the plea was sustained. What is apparent, however, from the judgment is, that their Lordships considered that the case should be determined on the words of the section themselves: no authority is even cited. In reference to those words it is said "That it 'might' have been made a ground of attack is clear. That it 'ought' to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word '*ought*' would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter 'ought' to have been made a ground of attack in the former suit, and, therefore, that it should be 'deemed to have been a matter directly and substantially in issue' in the former suit, and is *res judicata*."

The test, therefore, proposed whereby to determine whether it *ought* to have been matter of attack is this: are the matters so dissimilar that their union might lead to confusion? To my mind there is in this case but one answer to that question; that absolutely no confusion would have arisen had the plaintiff in the former suit pleaded in the alternative the title he now sets up. In this connection I may appropriately cite the remarks of Lord Westbury in *Srimut Rajah Moottoo Vijaya* v. *Katama Natchiar*[2]:

"In the first place, it is clear, upon the former record, that the appellant had then the power of relying upon that document as being a valid will. He 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 upon it as amounting to a valid devise in my favour. 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. The present appellant might have insisted on the validity of the alleged will; but instead of doing so when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed

(1) (1892) 20 Cal., 79. (2) (1866) 11 Moore's I. A., at p. 73.

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all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the appellant of setting up the will were allowed."

It probably would be enough to rest on the principle thus enunciated by the Privy Council; for the principle once ascertained, its application must depend on the facts of each case: but on the whole it will be more satisfactory to examine the rest of the cited cases, or at any rate the more material of them. In *Haji Hasam Ibrahim* v. *Mancharam Kaliandas* (1) Mr. Justice West and Mr. Justice Pinhey upheld the plea, so the decision there does not help the plaintiff. *Sadu* v. *Baiza*(2) must have been decided on the Code of 1859, which did not contain a section in the terms of section 13 of the present Code; so it cannot assist us. *Konerrav* v. *Gurrav* (3) is a decision on Explanation II to section 13 of the Code of 1877, which agrees with the terms of the present Code: it is, therefore, directly in point. The Court in upholding the plea of *res judicata* said (p. 594):

"The rule of *res judicata*, by which our Courts are to be guided, is now contained in section 13 of Act X of 1877. It is clear that the matter at issue in the present case was not heard and finally decided in the former suit, unless it be held that it was constructively in issue in the former suit by reason of the provisions of Explanation II to section 13, which enacts that 'any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.' It is possible that the plaintiff might, in his former suit, have made an alternative case, and have prayed that, if the Court should come to the conclusion that the title which he set up was a bad one, and that he was not entitled to the relief which he claimed, it should nevertheless award to him a different relief, founded upon a different and antagonistic cause of action. The plaintiff might, we say, possibly have been allowed to combine two such grounds of attack in one suit; but we cannot say that he ought to have done so. The injustice and inconvenience of insisting on such a procedure are very clearly pointed out by Garth, C. J., at page 162 of the report of the Full Bench case already referred to—*Denobundhoo Chowdhry* v. *Kristomonee Dossee* (I. L. R., 2 Cal., 152)."

All then that this case comes to is, that there the Court thought the circumstances such that it could not be said the

(1) (1878) 3 Bom., 137. (2) (1878) 4 Bom., 37.
(3) (1881) 5 Bom., 589.

plaintiff ought to have the two grounds of attack in the first suit. No test is proposed, nor any principle laid down, so that we are unable to say how far the decision proceeded on the principle later enunciated by the Privy Council. And when the circumstances of that case are examined, it is at once apparent that they widely differ from those with which we are now concerned, and that the determination to which they led can afford no solution of the question now under our consideration; for the confusion that might have resulted from a combination of the several matters appertaining to that case can afford no clue as to whether here the combination would have had a like result. Whether it would have altered Mr. Justice Melvill's opinion had Lord Westbury's remarks in *Srimut Rajah Mootoo Vijaya* v. *Katama Natchiar* been brought to his notice, I cannot say; but I find that in the later case of *Girdhar Manordas* v. *Dayabhai Kalabhai*[1] he, differing from his colleagues, held that the plea was a bar under the circumstances of that case. Mr. Justice West and Mr. Justice Pinhey it is true came to the opposite conclusion, and on their decision the appellant has relied before us. But as the second suit in that case was commenced in 1874, we naturally find no reference to section 13 of the subsequent codes, so that their decision, like that in *Haji Hasam Ibrahim's* case, is of no assistance in the present case.

The next case cited for the appellants is *Naro Balvant* v. *Ramchandra Tukdev*,[2] where Birdwood and Parsons, JJ., held that a suit in ejectment was not barred by a previous redemption suit in which it was held that the mortgage was not proved. The decision, however, throws no light on the point we are considering; for the case was argued and decided without reference to section 13, but solely on section 43.

And now I come to the last of the cited Bombay cases—*Becharji* v. *Pujaji*[3]—on which Mr. Kelkar relied principally for the remarks of Mr. Justice Candy at p. 54:—

"Here if the Subordinate Judge in the suit of 1883 was right in holding that the agreement was inconsistent with a general right to partition, then admittedly the right procedure was reference to a separate suit. If the Sub-

(1) (1882) 8 Bom., 174. (2) (1888) 13 Bom., 326.
(3) (1889) 14 Bom., 31.

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ordinate Judge was wrong—if, in short, the agreement merely admitted the general right to partition postponing the exercise of the right till the payment of the debts—then it would indeed be a mockery should plaintiff be told that his right is altogether lost because he took the suggestion of the Subordinate Judge, and bearing the burden of all the Court fees and costs in the former abortive suit of 1883, filed a fresh suit on the agreement. Any one with experience of the mofussil must concur with the remark of Garth, C.J., in *Denobundhoo's case* (I. L. R., 2 Cal., at p. 155): 'It seems to me that in a country like this, where, as in the mofussil, good advice may not be always available, a person may not claim a property in a proper manner.' The same opinion is expressed at length by Stuart, C.J., in *Babu Lal* v. *Ishri Prasad* (I. L. R., 2 All., 582 at p. 586) quoted above. He concludes: 'To refuse relief to a plaintiff who makes an apparently just claim simply because his ignorant district pleader had omitted a particular plea in a previous suit, is surely a proceeding of doubtful wisdom.' The many infirmities in pleading in the Bombay mofussil Courts have been alluded to above. To hold, therefore, that plaintiffs cannot now rely on the agreement of 1874 would amount to a denial of justice. Of course if law and authority oblige us so to decide, we are bound by law and authority whatever may be the consequences."

What we have to consider is the actual decision, and it appears to me the *ratio decidendi* was, that the omission from the first suit of that on which the second suit was based, was attributable to the action of the Court in the first suit. How far this was a tenable ground of decision we need not consider: we have no such circumstance here; for it is not suggested that any application was made for an appropriate amendment of the first suit.

This exhausts the cited Bombay cases, and the examination of them, which I have made, leads me to the conclusion that they disclose nothing which should induce us to hold that the circumstances of this case do not fall within the provisions of Explanation II.

Turning, then, to the decisions of the other Presidencies it is no doubt laid down by Brodhurst and Duthoit, JJ., in *Sheo Ratan Singh* v. *Sheo Sahai Misr* [1], that "the law does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them." This comes dangerously near controverting the proposition of Lord Westbury, and unless the statement be qualified it appears to me that it is not a correct exposition of the law. Sir Charles Turner's decision in

(1) (1884) 6 All., 358.

Sadaya Pillai v. *Chinni*[1] affords no help: it was a decision on the Code of 1859. In *Ummatha* v. *Cheria Kunhamed*[2] nothing was said as to Explanation II. *Allunni* v. *Kunjusha*[3] can hardly be regarded as supporting the appellants' argument, for there Muttusami Ayyar, J., lays down, that a party is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action.

Reliance has been placed on the opinion of Sir R. Garth expressed in *Denobundhoo* v. *Kristomonee*[4], but the value this opinion would otherwise have possessed, is discounted by the fact that the learned Chief Justice differed from the rest of the Full Bench.

Similarly, I cannot see that the argument is assisted by the decision of Macpherson and Hill, JJ., in *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh*[5], for at p. 88 of the report those learned Judges say, "It is not a case in which the plaintiffs having on a former occasion sued for a certain relief on the strength of one title afterwards claims the same relief on the ground of another title, of which on the former occasion he might have availed himself." At p. 711 of the same volume is the case of *Kailash Mondul* v. *Baroda Sundari Dasi*. But that case is based on the conclusion that in the former suit the matter was not finally heard and determined. How far this view is reconcileable with the decision of the Privy Council in I. L. R., 20 Cal., (*Kameswar* v. *Rajkumari*) to which I have already referred, but which was not cited to the Calcutta Bench, I need not pause to consider. Suffice it to say that in the light of that Privy Council decision it seems to me impossible to hold, under the circumstances of the case, that the matter was not finally heard and decided.

I have now dealt with all the cited cases, and I see no reason to abandon the view I expressed at the outset. In my opinion the plaintiffs ought to have pleaded their heirship as a ground of title; it existed at the date of the former suit; it is not suggested that they were ignorant of it, nor has any tenable ground of excuse been suggested before us. Therefore I hold that section 13

(1) (1879) 2 Mad., 352. (2) (1881) 4 Mad., 308. (3) (1883) 7 Mad., 264.
(4) (1876) 2 Cal., 152. (5) (1896) 24 Cal., 83.

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applies. In coming to this conclusion I have not overlooked the argument based on the difference between the two suits. It has no doubt been held, that "where a previous suit for a declaration of title and confirmation of possession of certain lands has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit for recovery of possession is not barred under section 43 of the Civil Procedure Code"—*Jibunti Nath* v. *Shib Nath*(1). Other decisions to the same effect might be cited, but obviously they involve no principle applicable to the circumstances of this case; for in the cases in which those decisions were pronounced the question of title was unnecessary for the determination of the earlier suit: here, however, that question had to be, and in fact was, decided. The value of this argument may be tested by applying it to the plea, which actually was raised in the former suit; and under the strain of this test Mr. Kelkar felt compelled to concede, that he could not in this suit have re-litigated the claim of title by survivorship. But if this be so, then equally it appears to me impossible to urge that the claim that should have been made is now open to litigation, for the section draws no distinction between the claim that was and the claim that ought to have been made, between the claim actually and the claim constructively made. And this appears to me obvious, when once it is perceived that the adjudication in the former suit determined not only the particular title alleged, but the actual right to the property by whatever title it might be claimed.

The result, then, is that in my opinion the appeal must be dismissed with costs and the decree of the lower Appellate Court confirmed.

CROWE, J.:—The only question arising in this appeal is whether the claim is a *res judicata* having regard to the provisions of Explanation II of section 13 of the Code of Civil Procedure. The plaintiffs in this case are first cousins of one Ningappa, who died in 1870 leaving a widow Chenbasava who died in 1894. They filed a suit, No. 19 of 1895, against the present defendant, the brother of the deceased Chenbasava, to be confirmed in the

(1) (1882) 8 Cal., 819.

possession of the land in dispute on the ground that it was joint family property of themselves and Ningappa and they were undivided co-parceners. The suit was dismissed by the Court on the ground that the family had been separate in estate for many years. No appeal was taken against that decision. Plaintiffs now bring the present suit as cousins and reversionary heirs of Ningappa to recover possession of the land in dispute. The Court of first instance held that plaintiffs were entitled to sue, and awarded the claim. The lower Court held that it did not seem equitable that after having once been sued on a false case the defendant should be allowed to be harassed again by the plaintiff about the same subject-matter, and held that the suit was barred by sections 13 and 43 of the Code of Civil Procedure.

Mr. Kelkar for the present appellants has cited numberless cases which have more or less application to the circumstances of the present case; and it is necessary to look closely at the actual words used by the Legislature. Explanation II of section 13 runs thus :—" Any matter which might and ought to have been made ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit." The lower Courts have found as a matter of fact that the plaintiffs have lived separate at Kakol from Ningappa and his father who lived at a different village for the last forty-eight or fifty years. When the former suit was brought in 1895, Ningappa had been dead for twenty-five years and his widow had died in the preceding year. The matter now in dispute, namely, that plaintiffs were the reversionary heirs of Ningappa, the last male holder, must have been within their knowledge at that time. It is clear the plaintiffs might have made that relation a ground of attack against the defendant who was the brother of Ningappa's widow and in no way connected with the family, and it is equally clear that they ought to have done so. The remarks of Lord Westbury in *Srimut Rajah Mooltoo Vijaya* v. *Katama Natchiar*[1] apply with force to the circumstances of the present case. There the appellant had sued for possession of a zamindári as the nearest male relation of the late owner on the ground that the property was undivided ancestral estate. In appeal he disclaimed

(1) (1866) 11 Moore's Ind. App., 50.

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any title under an alleged will which in reality he pleaded was not a testamentary devise and, therefore, its validity or invalidity was immaterial. Subsequently he brought a suit, founded on the allegation that the will was valid, to recover possession as devisee under the will. Lord Westbury gave judgment and said:

"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 upon that document as being a valid will. He 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, 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 upon it as amounting to a valid devise in my favour. 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 * * * * On every ground, therefore,—first, on the general ground that the thing was in issue, and that what was in issue must be taken to have been decided by the judgment * * * * * we are of opinion that there is no doubt as to the correctness of the determination of the Court below."

It has been contended by Mr. Kelkar that the cause of action in the two suits is different, that the matters in issue were so dissimilar that their union would have caused confusion, that the former suit was for a declaratory decree to confirm possession, and that the present suit is to recover possession. As their Lordships of the Privy Council remarked in *Soorjomonee Dayee* v. *Suddanund Mohapatter*[1], the term "cause of action" is to be construed with reference rather to the substance than to the form of action. In these cases the cause was in substance to obtain possession of the property. In the case of *Murti* v. *Bhola Ram*[2] the Court held that 'a plaintiff's cause of action consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.' It cannot be disputed that the plaintiffs might have made their present claim a ground of attack in 1895. It is also equally clear to my mind that they ought to have done so. Ignoring the fact that their father had lived apart in a

(1) (1873) 12 Beng. L. R., 304. (2) (1893) 16 All., 165.

different village for fifty years it was open to them to say we are joint co-parceners and claim by right of survivorship, and as an alternative case it was incumbent on them to say that if the Court comes to the conclusion that the family is divided, then we claim as reversionary heirs. As their Lordships remarked in *Kameswar Pershad* v. *Rajkumari Ruttan*(1), "where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' in Explanation II would become important." In the present case the matters were in every respect the same, the only difference being with regard to the evidence on which the right claimed was sought to be proved. I hold that the present matter both might and ought to have been made a ground of attack in the former suit and, therefore, that it must be deemed to have been a matter directly and substantially in issue in that suit, and that, to use the words of Lord Hardwicke in *Gregory* v. *Molesworth*(2), "where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they cannot raise the same question as between themselves in any other suit in any other form."

I am of opinion that the general law as to *res judicata* founded on the principle *nemo debit bis vexari pro eadem causa* applies to this case and that the lower Court has rightly held that the suit is barred. I would affirm the decree of the Court below and reject this appeal with costs.

Decree confirmed.

(1) (1892) 20 Cal., 79.

(2) (1747) 3 Atkyns, 626.