his mortgagor to mortgage the property. Therefore defendants Nos. 1 and 2, having been in possession of the property as mortgagors of the respondent (plaintiff), were bound to hold it in that capacity. If they were threatened or obstructed by the appellant claiming as the true owner, they ought to have given him (plaintiff) notice of the threat or obstruction so as to enable him to defend his rights as a mortgagee. But according to the finding of the learned District Judge, instead of doing that, they colluded with the appellant and that collusion was brought about by the appellant himself. It is by means of his own fraud that the appellant got into possession with the help of defendants 1 and 2, the heirs of the mortgagor. Under these circumstances the rule of estoppel which applied to them extends to the appellant also : *Pasupati* v. *Narayana* [1]. On this ground, and this ground alone, the decree must be confirmed, without prejudice to the right, if any, of defendant No. 3 to recover possession of this property by a separate suit. We must, therefore, confirm the decree of the Court below with costs.

Decree confirmed.

R. R.

(1) (1889) 13 Mad. 335.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

GOVIND BABA GURJAR (ORIGINAL DEFENDANT), APPELLANT, *v.* SHRIMANT JIJIBAI SAHEB (ORIGINAL PLAINTIFF), RESPONDENT.*

1911. *September* 14.

Ornaments—Unauthorized Pledge—Suit against pledgor—Subsequent pledge—Recovery of Judgment against pledgor—Non-satisfaction—Suit against pledgee for detention after demand—Tort-feasors—Judgment not res judicata*—Omission to raise an issue suggested by defendant—Defendant not claiming under a person against whom the issue was decided after defendant's transaction—Moveable property —Doctrine of* lis pendens *not applicable—Party and privy.*

Plaintiff brought a suit, No. 159 of 1897, against M to obtain a declaration that M was not adopted by plaintiff's step-mother and that she (the plaintiff) was the owner of the property in suit as the heir of her father and to obtain possession. The cause of action was laid in March 1897. The property in suit included

* First Appeal No. 191 of 1908.

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ornaments of considerable value which M had pledged with his creditor. After the filing of the suit M redeemed the ornaments and again pledged them with G with the exception of two which had already been pledged with G. The plaintiff recovered judgment against M but it was not satisfied. The plaintiff then brought the present suit, No. 56 of 1908, against G as pledgee of the ornaments from an unauthorized pledgor for detention of the ornaments after demand on or about the 11th August 1907. The defendant G answered that the judgment in the suit of 1897 was a bar to the present suit on the ground that the pledgor and the pledgee were joint tort-feasors and the matter had passed into *res judicata*. At the hearing of the suit the defendant wanted the Court to raise an issue as to whether M was not the validly adopted son, but the Court refused to frame the issue and admitted the judgment in the suit of 1897 (which had decided the issue in the negative) in evidence on the ground *inter alia* that the defendant, who was M's pleader in that suit, was a privy to it. The Court overruled the defendant's plea of *res judicata* and allowed the plaintiff's claim for the recovery of the ornaments or their value.

Held, on appeal by the defendant, that the defendant's plea of *res judicata* could not stand. The cause of action in the second suit must be precisely the same as the cause of action in the first suit in order to make the judgment in the first suit a bar to proceedings in the second suit.

Held further, that it was an error not to raise an issue as to whether M was not the validly adopted son and to admit the judgment in the former suit in evidence on the ground that the defendant was a privy to it. The judgment in the former suit was subsequent to the pledge and the defendant did not claim under a person against whom the issue of adoption had been at the time of the pledge finally heard and determined. The fact that the former suit was pending at the time of the pledge of the ornaments could not prejudice the defendant on the issue of *res judicata*, for the doctrine of *lis pendens* did not apply to moveable property. The defendant was, therefore, not a privy of M and was not bound by that judgment.

Held also, that the judgment in the previous case was irrelevant to prove that M had got possession of the ornaments by means of fraud.

FIRST appeal against the decision of S. S. Wagle, First Class Subordinate Judge of Thana, in original suit No. 56 of 1908.

The facts of the case were as follows :—

Sardar Manajirav Raghojirav Angre of Alibag in the Thana District died in August 1896 leaving him surviving his widow Gajrabai Saheb and a daughter Jijibai Saheb, a minor, who was the step-daughter of the widow. Gajrabai Saheb died at Alibag on the 11th March 1897. After her death, one Madhavrav Khanderav Barge, alleging that he was adopted by Gajrabai Saheb and assuming the name Raghojirav Manajirav

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Angre, took possession of all the moveable and immoveable property of the deceased Sardar Manajirav Angre and pledged ornaments of considerable value with Vithaldas Narottamdas. Jijibai Saheb, who was residing at Baroda with her maternal grand parents at the time of Gajrabai Saheb's death, having learnt of the alleged adoption of Madhavrav Khanderav Barge and the recovery of possession by him of the estate, brought a suit, No. 159 of 1907, in the Court of the First Class Subordinate Judge of Thana against him as defendant 1 and Ravji Hari Athavle, a clerk managing the estate, as defendant 2, to obtain *inter alia* (1) a declaration that Madhavrav Khanderav Barge was not adopted by Gajrabai Saheb, and that if an adoption ceremony did take place it was void, and (2) for a declaration that the plaintiff was the owner of the plaint property as heir of her father Manajirav Raghojirav Angre, and (3) to obtain possession of the same. It was alleged that Gajrabai Saheb died of plague on the 11th March 1897 and she was in an unconscious condition on the 9th March, when the adoption was said to have taken place, and that neither the plaintiff nor any one on her behalf being present at Alibag at the time of Gajrabai Saheb's death, defendant 1 with the help of defendant 2 took possession of all moveable and immoveable property and papers of the deceased Manajirav. The cause of action was laid on the 11th March 1897 and the suit was filed on the 15th October following.

After the suit was filed defendant 1, Madhavrav Barge, redeemed all the ornaments except two from Vithaldas Narotamdas and pledged them again with Govind Baba Gurjar, a retired pleader residing at Alibag, on the 20th October 1897. The two ornaments were already pledged with Govind Baba Gurjar on the 12th June 1897.

The Subordinate Judge having decreed the plaintiff's claim, the defendants presented an appeal, No. 9 of 1900, to the High Court, which, on the 7th January 1901, confirmed the decree with very slight modifications.

Jijibai Saheb having failed to obtain satisfaction of the said decree, she filed the present suit against the pledgee Govind

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Baba Gurjar alleging that the ornaments in list A annexed to the plaint were, after the death of Girjabai Saheb, wrongfully delivered in the defendant's possession by Madhavrav Khanderav Barge, that though the delivery of the ornaments by Madhavrav to and receipt of the same by the defendant was unlawful, the defendant wrongfully retained them in his possession and that though the plaintiff had demanded the ornaments from the defendant by a notice, dated the 30th July 1907, the defendant refused to comply with the plaintiff's demand on or about the 11th August 1907; hence the cause of action arose on that day. The claim was valued at Rs. 40,000 and the suit was filed on the 10th March 1908.

The defendant answered *inter alia* that in suit No. 159 of 1897 the plaintiff obtained a decree against Raghojirav Angre *alias* Madhavrav Barge for the recovery of the same ornaments or their value, therefore the plaintiff was debarred from suing the defendant for the same ornaments, that the plaint did not disclose a proper and sufficient cause of action to sue the defendant, that Raghojirav Angre *alias* Madhavrav Barge pledged some ornaments with the defendant and in suit No. 159 of 1897 the plaintiff had acquiesced in the defendant's *bona fides*, therefore Raghojirav should be made a party to the suit, that the plaintiff was not the proper heir to the property of the deceased Manajirav Angre, the proper heir being his adopted son Raghojirav, that in suit No. 159 of 1897 the plaintiff had impliedly acquiesced in the *bona fides* and purity of the transaction of the defendant in taking a pledge of the ornaments and advancing money to Raghojirav, therefore, the plaintiff's suit against the defendant could not lie, that the defendant put in a list of the ornaments pledged with him by Raghojirav and their value was about Rs. 6,250, that the allegation about wrongful giving and wrongful taking of the ornaments was false, that the suit was brought in collusion with Raghojirav, that Raghojirav, thinking that it was not profitable to him to redeem the pledge, had executed an agreement by way of *sodchitti* (relinquishment) in favour of the defendant and that the ornaments entered in the list produced

by the defendant were originally pledged by Raghojirav with Vithaldas Narottamdas and he redeemed and pledged them with the defendant for the expenses of the funeral ceremonies of Gajrabai Saheb, for the obsequies of Manajirav, for payment of Government assessment, and for other proper and necessary expenses. The defendant had, therefore, a lien on the ornaments for Rs. 22,054-4-0 and the plaintiff was not entitled to get them without paying that amount.

After the issues were framed, the defendant's pleader asked for the following two issues :—

(1) Whether the plaint discloses a cause of action against the defendant?

(2) Whether Madhavrav Khanderao Barge was adopted by Gajrabai and whether the adoption was valid?

The Subordinate Judge refused the issues on the ground that the plaint clearly disclosed a cause of action and the second issue was decided by the High Court in appeal No. 9 of 1900 in suit No. 159 of 1897.

On the issues raised by the Court the findings were that (1) the judgment in suit No. 159 of 1897 was not a bar to the present suit, (2) Raghojirav Manajirav Angre *alias* Madhavrav Khanderav Barge was not a necessary party to the suit, (3) plaintiff was the heir of Manajirav Angre, (4) there was no acquiescence on the part of the plaintiff to the pawn of the ornaments with the defendant so as to debar her from maintaining the suit, (5) Rs. 20,000 was the value of the ornaments admitted by the defendant to have been pledged with him, (6) other ornaments mentioned in the plaint were not kept with the defendant, (7) the plaintiff was entitled to obtain possession of the ornaments pledged with the defendant by Madhavrav Khanderav Barge, and (8) Rs. 20,000 were due to the defendant.

On the strength of the above findings, the Subordinate Judge passed the following decree :—

I therefore order that plaintiff do (at her option) recover from the defendant the ornaments admitted by the defendant in his written statement or their value Rs. 20,000 (twenty thousand). I dismiss the rest of the claim. Defendant to pay the plaintiff's costs in proportion to the claim awarded and plaintiff to pay the defendant's costs of the claim rejected.

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With respect to his findings on the first two issues the Subordinate Judge observed :—

The contention of the defendant embodied in the first issue rests on two grounds (1) the principle of law that a judgment against one of several joint tort-feasors is a bar to a subsequent suit against the others, and (2) the law of *res judicata*.

Before the principle of law relied upon in ground (1) can be applied to the present case it must be shown that the previous judgment in suit No. 159 of 1897 was given against Madhavrao Khanderao Barge in respect of the same tort that forms the subject of the present suit. Unless that is shown, the whole argument falls to the ground. Now what are the facts? (See the facts stated above.)

It appears to me clear that the cause of action in suit No 159 of 1897 was the wrongful taking by Madhavrao on 11th March 1897 of the property of which plaintiff was owner as heir of her father Manajirao Angre.

In the first written statement presented by Madhavrao Barge there was no reference to the pledge of the ornaments to the present defendant. But in a supplementary written statement filed on 24th March 1898 (Exhibit 9) he stated that certain of the ornaments were pledged with and were in the possession of his Sávkár, Mr. Govind Baba Gurjar.

On the same day an application was made on behalf of the plaintiff for an order to the defendant that he should not take the ornaments from the Sávkárs into his own possession, and that if he wished to redeem the ornaments, he might pay off the Sávkárs but should cause them to produce the ornaments in Court direct or hand them over to the receiver appointed by the Court. An order to the Sávkárs not to deliver the ornaments to Madhavrao Barge was also asked for. The Court granted an injunction as prayed for against the defendant and the creditor Govind Baba (Exhibit 10).

It appears from Exhibit 6 that two of the ornaments were pledged with the present defendant on 12th June 1897 and the rest on the 20th October 1897, *i. e.*, after the suit No. 159 of 1897 was filed.

It is obvious from these facts that the wrong for which Madhavrao Barge was sued in suit No. 159 of 1897 was a distinct wrong from that for which the present defendant is sued. The two tortious acts were separate and independent, not only as to the dates of commission but as to their character also. Madhavrao Barge's mal-feasance was complete on 11th March, when he took possession of the property. The defendant's tort is said to have occurred on 11th August 1907 when he refused to deliver the ornaments to the plaintiff. "It may not unfrequently happen that the owner of a chattel who has wrongfully been deprived of his possession may have a remedy against more than one person. A may have wrongfully taken it, and B may afterwards have wrongfully detained it. A and B are not joint tort-feasors : there is a perfectly independent right of action against each." (Clerk and Lindsell's Law of Torts, pp. 282-283). The cause of action in the former suit against Madhavrao Barge being thus different from the cause of action in the present suit, it cannot be said that the judgment in that suit was against a joint wrong-doer of the tort which forms the subject of this suit. That judgment there-

fore is no bar to the present suit. Of course, if that judgment had been satisfied by Madhavrao Barge, it would have operated as a bar to further proceedings against the defendant. (Dicey on Parties to an Action, pp. 436-437.) It would have had that effect not because Madhavrao was a joint tort-feasor but because the damage to plaintiff was the loss of the ornaments and plaintiff's claim would have been satisfied: and the satisfaction would have been a good defence to a suit against the defendant in respect of the same ornaments. But it is not alleged that Madhavrao Barge has satisfied the judgment passed against him in suit No. 159 of 1897. I am of opinion therefore that that judgment is no bar to the present suit against the defendant. Then as to the second ground of *res judicata*, it was argued that the defendant claims under Madhavrao Barge, who was a party to suit No. 159 of 1897, that the subject matter, *viz.*, the ornaments, is the same; the title, *viz.*, the wrongful deprivation, is the same: therefore, section 13 of the Civil Procedure Code is a bar to the present suit. If the defendant claims under Madhavrao Barge and the subject matter and the title are the same, then it would seem that the judgment in the former suit will bind the defendant and operate as a complete bar to the defence. But I am unable to accept the contention that the title, *viz.*, the wrongful deprivation of the ornaments, was the same. I have already stated above that Madhavrao Barge's tort was distinct from the tort of the defendant.

The pledge to the defendant (except of two ornaments) had not occurred at the date of the institution of Suit No. 159 of 1897.

The defendant's tort is said to have arisen not when the pledge was made but when he refused to deliver the ornaments to plaintiff on 11th August 1907. That tort was not a matter directly and substantially in issue in the former suit. It is therefore not a *res judicata*. Coming to the second issue it appears to me that the defendant's contention that Madhavrav Barge was a joint wrong-doer with the defendant can hardly be reconciled with his insistence that he (Madhavrav Barge) should be made a party to this suit. It is a well-known principle of law that every person who joins in committing a tort is separately liable and there does not exist any joint liability for a wrong in the sense in which there exists a joint liability for a breach of contract (*see* Dicey on Parties, pp. 430-431). A joint tort feasor, therefore, cannot insist that the other wrong-doers should also be made defendants. On this ground Madhavrav Barge is not a necessary party to this suit. The plaintiff has already got a judgment against him and is not willing to join him as a defendant in this suit. I myself do not see that the ends of justice require Madhavrav Barge's presence in this suit, and no useful purpose can be served by joining him as a party.

The Subordinate Judge further on observed :—

In Suit No. 159 of 1897 it was held by this Court that Madhavrav Barge was not the adopted son of Gajrabai and Manajirav Angre. This decision was confirmed by the High Court.

It is argued for the defendant that he, the defendant, not being a party to that suit is not bound by it; that he is entitled to prove that Madhavrav Barge was adopted by Gajrabai; that the decree in Suit No. 159 was obtained by fraud.

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The last objection was not set up as a defence in the defendant's written statement and no issue was asked for about it. The defendant cannot therefore be allowed to urge the objection of fraud. There is not the remotest suggestion of fraud in the written statement. On the contrary the judgment in Suit No. 159 was pleaded as a bar to the plaintiff's present suit.

* * * * * *

Then there remains only the other objection that the decree in Suit No. 159 is not binding on the defendant. The defendant did ask for an issue as to whether Madhavrav Barge was adopted by Gajrabai, but I declined to frame an issue on the point, being of opinion that the question was settled by the decision of Suit No. 159 confirmed by the High Court and that it should not be re-opened. It is now argued that the decision in Suit No. 159 is not a judgment *in rem* and cannot be admitted as against the defendant who was not a party to it. A passage in Mayne's Hindu Law (pp. 204, 205, 7th Edition) is cited in support of the argument. But what Peacock, C. J., said was that a decision upon a question of adoption "is not a judgment *in rem* or binding upon strangers, or, in other words, upon persons who were neither parties to the suit nor privies". Does the defendant stand in the position of a stranger? He was certainly not a party to the previous suit, but was he not a privy? Privy, as distinguished from a party, "signifies him that is a partaker or hath interest, in any action or thing".

"Privy to" is used in the sense of having knowledge of a thing (Stroud's Judicial Dictionary). Now the defendant admits that he came to know of the Suit No. 159, two or four days after it was instituted. He was also Madhavrav's pleader in that suit. It is therefore impossible to hold that he was not a privy to that suit. The bulk of the ornaments were pledged with him after the institution of that suit, *i.e., pendente lite*. In my opinion therefore the defendant is bound by the decision in Suit No. 159 of 1897.

It was admitted by the defendant's pleader that the only evidence which he desires to adduce to prove that plaintiff Jijibai is not the heir of Manajirav Angre is the evidence which will establish that Madhavrav Barge was adopted by Gajrabai. But as the question of adoption has been set at rest by the decision in Suit No. 159 and cannot be reopened, the evidence offered by the defendant cannot be received. The plaintiff's heirship to Manajirav Angre is not questioned on any other ground. Therefore my finding on the third issue is that plaintiff is the heir of Manajirav Angre.

The defendant appealed.

Jayakar, with *G. S. Rao* (Government Pleader), for the appellant (defendant).

Weldon and *Rangnekar*, with *K. H. Kelkar*, for the respondent (plaintiff).

SCOTT, C. J.:—The plaintiff sues the defendant as pledgee of certain ornaments from an unauthorised pledgor for detention

of those ornaments after demand made on or about the 11th of August 1907. That claim was preferred after the plaintiff had recovered judgment in a former action, No. 159 of 1897, against the pledgor but the judgment so recovered has not been satisfied.

It has been pleaded that the judgment in the suit of 1897 is a bar to this suit on the ground that the pledgor and the pledgee were joint tort-feasors and that upon the authority of *Brinsmead* v. *Harrison*[1] the matter has passed into *res judicata* and cannot be again agitated.

It has, however, been pointed out by Mr. Justice Willes in the judgment of the lower Court in *Brinsmead* v. *Harrison*[2] that a fresh assignment in respect of a tort subsequent to that originally sued upon will not come within the scope of the first judgment so as to bar the fresh assignment. We may also refer to the case of *Wegg Prosser* v. *Evans*[3] which shows that the cause of action in the second suit must be precisely the same as the cause of action in the first suit in order to make the judgment in the first suit a bar to proceedings in the second suit.

For these reasons we are of opinion that the plea of *res judicata* must fail in so far as it is based upon *Brinsmead* v. *Harrison*.[1]

The next question is whether the defendant was precluded from contending that the plaintiff was not entitled to the property of the person under whom she claimed. The defendant set up that his pawnor was a validly adopted son of that person. But it was argued on behalf of the plaintiff that the question of his adoption had already been settled in suit No. 159 of 1897 adversely to the pawnor and that therefore as the defendant claimed through the pawnor he was bound by the judgment in that suit.

The defendant wished to raise an issue as to whether the pawnor was not the validly adopted son, but the learned Judge of the lower Court disallowed the issue and admitted in evidence

(1) (1872) L. R. 7. C. P. 547. (2) (1871) L. R. 6 C. P. 584.
(3) [1895] 1 Q. B. 108.

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the judgment in suit No. 159 of 1897 on the ground that the defendant was a privy to that judgment.

We are of opinion that in so doing he was in error. The judgment in suit No. 159 of 1897 was no bar to the issue sought to be raised by the defendant as it was subsequent to the pledge and the defendant did not claim under a person against whom the issue of adoption had been at the time of the pledge finally heard and determined, see *Doe dem. Foster* v. *The Earl of Derby*(1), *Hodson* v. *Walker*(2), and *Niaz-ullah Khan* v. *Nazir Begam*(3). The fact that the suit No. 159 of 1897 was pending at the time of the pledge of a large portion of the ornaments sought to be recovered in this suit cannot prejudice the defendant on the issue of *res judicata*, for, the doctrine of *lis pendens* does not apply to moveable property, see *Wigram* v. *Buckley*(4). The defendant therefore was not a privy of the person who was defendant in suit No. 159 of 1897 and is not bound by that judgment.

We must, therefore, set aside the decree of the lower Court and remand the case for re-trial upon the second issue propounded by the defendant and disallowed by the Subordinate Judge. On the remand the Subordinate Judge should, if required so to do by the defendant, compel the production of the books held by or on behalf of the plaintiff which were not produced at the first hearing.

For the reasons which we have already given for holding that the judgment in suit No. 159 of 1897 did not operate as *res judicata* on the question of adoption, we hold that it was also irrelevant on the question whether the pawnor got the pledged property by means of fraud. That is a question which, if the plaintiff wishes to establish it, must be proved by evidence in this suit.

The issues to be determined on remand will be the issues of adoption and fraud, and the lower Court must pass a fresh decree after going into those issues.

(1) (1834) 1 Ad. & E. 783 at p. 790.
(2) (1872) L. R. 7 Ex. 55.
(3) (1892) 15 All. 108.
(4) [1894] 3 Ch. 483.

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We express no opinion on any other issues except those that we have dealt with in our judgment.

Costs of this appeal must be dealt with by the trying Judge on remand.

Issues sent down.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

1911. *September* 29.

PARVATIBAI, WIDOW OF TRIMBAK GANESH AGASHE (ORIGINAL PLAINTIFF), APPELLANT, *v.* YESHWANT KRISHNA SHETE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS *.

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2—Agriculturist—Definition †*—Sources of income—Agriculture—Scholarship or stipend received by a student is not income from non-agricultural sources.*

The income from agricultural sources of two brothers was Rs. 250 a year. They had two houses which yielded as rent Rs. 30 a year. One of the brothers held a scholarship of Rs. 15 a month; and the other received a stipend of Rs. 7 a month at a training college. The money they thus received from non-agricultural sources amounted to Rs. 294. A question having arisen whether they were agriculturists within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879):—

Held, that the brothers were agriculturists, for the money they received either as scholarship or stipend were mere bounties.

SECOND appeal from the decision of P. E. Percival, District Judge of Satara, reversing the decree passed by J. H. Betigiri, Subordinate Judge of Rahimatpur.

Execution proceedings.

The decree under execution was obtained by Trimbak (the husband of Parvatibai) against the father of the defendants. Parvatibai applied to execute the decree by attachment and sale of the defendant's house. The defendants objected to the

* Second Appeal No. 130 of 1911.

† The definition runs as follows:—

"Agriculturist" shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within those limits.