Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Woomatara Debea v. *Krishtokaminee Dassee, Wooma Soondoree Dassee, and others, from the High Court of Judicature at Fort William, in Bengal; delivered May* 31*st* 1872.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THEIR Lordships propose to dispose of this Appeal upon the only point that was dealt with by the High Court, namely, whether the present suit can properly be brought consistently with the second section of the Act of Procedure. That clause is in these words: "The Civil Court shall "not take cognizance of any suit brought on a "cause of action which shall have been heard "and determined by a court of competent juris-"diction in a former suit between the same "parties or between parties under whom they "claim."

The first question that occurs to their Lordships upon that section is, what is meant by the cause of action? And in the present case they are clearly of opinion that the cause of action in both suits was the dispossession of the Appellant by the fixing of the boundary which is now complained of, and the other proceedings which culminated in the decision of the Judge in the Act IV. case. The result of those proceedings was to affirm the possession of the Defendants in the land which was the subject of the first suit, and to leave the party who felt aggrieved by them to her remedy by a civil suit.

The first suit was accordingly brought, and in the present suit both courts have found, and it has been fairly admitted at the bar, that the land which is now in dispute is a portion of the land which was then sued for. The identity, therefore, of the subject matter of the two suits is admitted, and, as their Lordships have already said, the cause of action in both was the dispossession of the Appellant by reason of the proceedings then taken.

It is sought, however, to distinguish the case upon the ground that the Appellant, who was the Plaintiff in the former suit, saw fit in that suit to admit that no portion of the land then sued for was included within the limits of talook Shahazadapore, as originally settled and defined by the dowl, but that she had as talookdar of that talook acquired title to it as towfeer; that is, that by gradual squatting or encroachment she had enlarged the boundaries of her talook, and by bringing the land into cultivation had acquired a preferable right to have the settlement made with her.

Now, it is perfectly clear to their Lordships upon the proceedings that the real question in issue to be determined between the parties then was whether the lands then sued for, which included the lands now sued for, belonged as of right to the talookdar, or whether they fell within lot 32, which belonged to the Defendants? and it was open to the Plaintiff, the present Appellant, in the former suit to shape her title in either of three ways. She might have said, as she did say, according to Mr. Doyne's argument to-day, that the whole of the land then claimed was towfeer land; or she might have said, a portion of the land fell within the talook as originally settled and formed part of the 7,000 odd beegahs mentioned in the dowl, and the residue of it is towfeer land; or she might have put her case in the alternative, and have said that she had a good title to a portion as her original land, but that should the

proof of that fail, that portion also was to be considered as towfeer land.

With the full knowledge of all the circumstances, she chose to say, "I admit that I am "in possession of all that I was entitled to under "the dowl, but I claim this land, the whole of "it, as towfeer land." The contention now is, that although she saw fit to take that course then, she has now a right to fall back upon the other title, and to say, "The boundary "was improperly drawn, so as to include in "the Defendants holding that which of right "should have been within my originally settled "talook, and, as I now claim in that way that "which I might have claimed in the former "suit, I am not precluded from bringing this "second suit." It appears to their Lordships that that contention cannot prevail against the clear terms of the section in question, or indeed upon principle.

It is clear that it does not fall within the principle of the decision given by Lord Justice Turner at this Board upon the earlier regulation, in which he takes the distinction that the regulation "was "only to prevent the re-trial of the same question, "and that it was not intended to apply to cases "like the present, in which new circumstances "had intervened and altered the nature and "character of the questions to be determined." Here no new circumstances at all have intervened.

Nor does it appear to their Lordships necessary to decide whether in some of the cases put by Mr. Doyne, where the party was suing entirely under a new and a different title, such a distinction as he contended for might not be taken; because here it seems to their Lordships that the matter in dispute throughout was the title of the talookdar of this talook to the land in question, and the possession which she had thereby acquired, and it is perfectly clear upon the proceedings in the earlier suit, that her right in any way to this land was capable of being therein

determined. The Court in that suit seems almost to have considered that the title now sued upon had been put forward and could not prevail, and that if the talookdar had any title at all it was by way of towfeer.

The Court of Appeal, proceeding on the admission of the Plaintiff that the whole of the originally settled talook was in her possession, and that all she had been dispossessed of was claimed by her only as towfeer lands, dealt with that claim; but it is perfectly clear that if the Plaintiff had chosen to put forward the other title in the way I have suggested, the Court would have dealt with the whole question, and considered it, that question being in point of fact a mere question of quantity and boundary, and whether the Plaintiff was in any way entitled to recover the lands sued for from the Defendants, who are the Defendants also in the present suit.

It therefore seems to their Lordships that the case really falls within the principle and letter of the section in question, which has been properly decided to be a bar to the suit.

They think it desirable to remark that the principle upon which their decision in this case proceeds seems to be almost identical with that laid down in a judgment delivered by Lord Westbury in the case of Kattama Nauchear in 11 Moore's Indian Appeals, page 72. In that case a party had brought a suit, claiming under a will, having, as Defendant in a former suit, abandoned his title under that will, admitting that the will did not amount to a devise, and resting his title upon the issue, whether the estate was separate or undivided, and Lord Westbury said: "That being "the state of the case, we are now called upon to "approve of a suit subsequently instituted by the "very person who had deliberately given this "character to the instrument, a suit founded "upon an allegation wholly contradicting what "he had stated to this court of justice, and "insisting upon this paper as being a valid will

" and testament. 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 suit of 1856 in the alter- " native. 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 pro- " perty, then my title arises under this instru- " ment, and I plead and rely upon it as amount- " ing 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 " all the 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 Appel- " lant of setting up the will were allowed."

The present case is even stronger than that referred to, inasmuch as in the latter the party was a defendant in the first, and plaintiff in the second suit; whilst the Appellant is Plaintiff in both suits, and as such had in both the means of shaping her case as she chose.

Their Lordships therefore entirely concurring with the judgment delivered by Mr. Justice Phear in the High Court, are of opinion that this Appeal must be dismissed. It is possible that the Appellant has lost what she might have been entitled to; but if she has lost it, the loss is

entirely the result of her own mode of dealing with her case in the former suit.

Their Lordships have only further to observe that the Appeal must of course be dismissed, with costs, but that the ordinary rule of this Board is to give only one set of costs to the Respondents in the same interest. We have not had an opportunity of knowing why there has been a severance in defence, or whether there are any special grounds why that rule should be varied.

After some discussion at the bar on this point Sir James Colvile said :—

Their Lordships see no ground for departing from the general rule of allowing but one set of Respondents' costs ; and considering that those represented by Sir Roundell Palmer were first in the field and had entered their appearance first, their Lordships think that the Collector, as Court of Wards, and representing the infant Defendant, would sufficiently have discharged his duty, and have exercised a sound discretion, if, seeing that the suit was to be substantially defended, he had left the defence in the hands of the other Respondents ; or, at most, had applied for leave to join in their case. Their Lordships do not think that there was a necessity for his increasing the costs by coming forward as a separate Respondent. Their Lordships therefore think they ought not, in justice to the Appellant, to do more than give one set of costs, and that they ought not, in justice to the principal and original Respondents, to deprive them of any part of their costs.