and a creditor is also competent by taking certain steps to have his claim paid out of or secured on the property. His receipt, therefore, would also operate to extinguish a claim capable of being made a charge and a possible interest in the immoveable property, but the interest would not be specific. It would be an interest which, to use the words of PHEAR, J., has "no definite existence." It seems to us that this widow's receipt differs very little from that of a creditor, and that she had no such specific interest, vested or contingent, as was intended by the *Registration Act*.

On this ground we dismiss the second appeal with costs.

NOTES.

[INTEREST IN IMMOVEABLE PROPERTY—REGISTRATION ACT—

Assignment of *Inam* rights over certain lands held by *mirasi* tenants, including the right of succession and collection of yearly rent of Rs. 40, requires registration under Sec. 17, Cl. (b) as the assignment passed interest in immoveable property of the value of more than Rs. 100 :—(1900) 24 Bom. 615. See other cases cited in it.]

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[192] APPELLATE CIVIL—FULL BENCH.

The 29th April, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, MR. JUSTICE INNES, MR. JUSTICE KERNAN, AND MR. JUSTICE MUTTUSAMI AYYAR.

Manappa Mudali.....(Plaintiff) Appellant

versus

S. T. McCARTHY.....(First Defendant) Respondent.*

Civil Procedure Code, Section 586—Second Appeal—Suit of the nature cognizable by Small Cause Courts—Bona fide *question of title incidentally raised in Munsif's Court*—Res judicata—*Section 13, Explanation II, Civil Procedure Code—Competent Court—Final decision—Questions directly in issue.*

The jurisdiction of a Small Cause Court is not ousted in a suit for damages for carrying away the produce of certain land when the defendant sets up title to the land in answer to the claim.

Section 586 of the Code of Civil Procedure† precludes a second appeal in a suit for damages under Rs. 500, although the suit has been instituted in the District Munsif's Court and not in a Court of Small Causes, and although a question of title has been raised by the defendant and decided.

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* Second Appeal No. 458 of 1879 against the decree of G. A. Parker, Acting District Judge of Chingleput, confirming the decree of the District Munsif of Chingleput, dated 12th May 1879.

No second appeal in certain suits.

† [Sec. 586 :—No second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.]

Per TURNER, C. J.—When a suit is brought in a form in which it is cognizable by a Small Cause Court under Act XI of 1865, the Court cannot decline jurisdiction if it appears that incidentally a question of title is raised which it has not jurisdiction to determine for any other purpose than the decision of the suit before it. Under such circumstances the Court may, however, properly grant a reasonable adjournment that the question may be litigated and determined by the proper tribunal.

Per MUTTUSAMI AYYAR, J.—The question, What is a suit of the nature cognizable in Courts of Small Causes within the meaning of Section 586 of the Civil Procedure Code, has reference to the mode of adjudication and not to the *forum*, and the fact that the suit is instituted in the District Munsif's Court and not in a Court of summary jurisdiction makes no difference for the purposes of that section. If the matter adjudicated on in a suit is only incidentally in issue or cognizable, the adjudicatian is final whether by a Court of concurrent or limited jurisdiction only for the purpose and object of that suit.

Per INNES, J.—The decree of a Small Cause Court in a case where a question of title is raised incidentally is no bar to a suit upon the title under Section 13, Explanation II of the Civil Procedure Code, because the Small Cause Court is not competent of pass a decree upon the title.

THE plaintiff, claiming to be the sole Mirasidar of the village of *Pekaranai*, and as such, entitled to all *samudayam* rights, **[193]** including the right to fell trees on the tank bunds in the village, sued the Sub-Collector 1, the Tahsildar 2, Padre *Peters* 3, and the Village Munsif 4, for Rs. 80-8-0, the value of bamboos planted by plaintiff's ancestors, cut down by defendant 4, under the orders of the defendants 1 and 2, and carried away by defendant 3.

The defence was that the land was poramboke, reserved for public purposes; and that, even if the trees were planted by the plaintiff's ancestor, the tank bund and all the trees on it belonged to Government.

The District Munsif dismissed the suit on the ground that "the right to cut trees on a tank bund is a public right, which passed away from the village communities to the centralized British Government and its officers during recent changes."

On appeal the District Judge found that the tank bund was Government poramboke, and that what the plaintiff claimed was a proprietary right to trees on the land of another; and held that it was immaterial who planted the trees, because *quicquid plantatur solo, solo cedit.* He also found that the Revenue authorities had exercised the rights of Government in controlling the felling of trees, and dismissed the appeal.

The plaintiff appealed to the High Court on the grounds that Government was only entitled to kist for the land in question, and plaintiff, as sole proprietor of the village, was entitled to the poramboke; that he was entitled to the trees planted by his ancestors, and that Government had acquiesced in his right to the trees.

Mr. *Wedderburn* for the Respondent took the preliminary objection that no second appeal lay by virtue of Section 586, *Civil Procedure Code.*

The Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.) determined to refer the question to a Full Bench, and delivered the following **Judgments**:—

Turner, C. J.—This suit was instituted in the District Munsif's Court to recover Rs. 80-8-0 damages, being the value of certain bamboos, as the plaintiff alleges, wrongfully cut and carried away by the third defendant under the orders of the first defendant. The bamboos grew on the bund of a tank. The plaintiff alleges that the tank is poramboke within the area of his **[194]** mirasi estate; that, as Mirasidar, he is entitled to fell trees on the poramboke;

and that the bamboos cut and carried away by the third defendant were planted by his ancestors. The first defendant pleaded that the tank bund was poramboke, reserved for public purposes; that the land and the trees growing on it were the property of Government; and that, if the bamboos had been planted by the plaintiff's ancestor, that circumstance could confer on him no title to them. When the second appeal was brought forward for argument, the respondent advanced the preliminary objection that, inasmuch as the suit was of the nature cognizable by a Court of Small Causes, and the value of the subject-matter did not exceed Rs. 500, no second appeal lay. We have then to consider whether the suit is of a nature cognizable by a Small Cause Court.

In *Ammalu Ammal* v. *Subbu Vadyar* (2 M.H.C.R., 184) it was ruled that, where a suit appears to be within the cognizance of a Court of Small Causes, although the mere denial of the plaintiff's right or title on the part of the defendant is not sufficient to oust the jurisdiction of that Court, yet, when it reasonably appears that a *bonâ fide* question of title, which it is not within the jurisdiction of Small Cause Courts to decide, is fairly raised in the suit, the jurisdiction of the Small Cause Courts in the matter ceases.

In *Dikshit* v. *Dikshit* (2 Bo. H. C. R., 4) it was held that, where a suit appeared from the plaint to be of the nature cognizable by a Court of Small Causes, but a question of title had been gone into and decided by the District Court in appeal, a special appeal would lie.

These cases were decided before Act XI of 1865, but the terms of that Act, in reference to the classes of suits cognizable by Courts of Small Causes, are substantially the same as were the terms of Act XLII of 1860.

In neither of the cases abovementioned is reference made to the terms of the *Small Cause Courts Act* which warranted the conclusion that the jurisdiction of the Small Cause Court in a suit it was competent to entertain would be ousted by a plea raised by the defendant.

[195] In *Hedartollah* v. *Shaikh Karloo* (7 W. R., 73), where a suit was brought to recover a less sum than Rs. 500 for crops misappropriated, it was, on the other hand, held that a special appeal did not lie, although the determination of the suit involved a decision on a question of title to land.

Grant v. *Modhoosudun* (10 W. R., 79) and *Ram Dyal Gangooly and others* v. *Hurs Soondaree Dassia and others* (10 W. R., 272) are rulings to the same effect, as are also *Mohesh Mahto and another* v. *Shaik Piru* (I. L. R., 2 Cal., 470) decided by the Chief Justice, JACKSON, J., MACPHERSON, J., MARKBY, J., and AINSLIE, J., and *Shamanund* v. *Nundkoomar* (N. W. P., Agra, Vols. 4 and 5, p. 290) which was decided also by a Full Bench. See also *Tnayat Khan* v. *Rahmat Bibi* (I. L. R., 2 All., 97).

In my judgment the question must be determined in reference to the terms of Act XI of 1865. In the 6th section of that Act it is declared what suits are cognizable by Courts of Small Causes, and among others it is declared that suits for damages, not exceeding in amount Rs. 500, with certain exceptions, are cognizable by those Courts.

In the English Statutes 9 and 10, Vic. 95, Section 58, it is expressly declared that the Courts established under that Act shall not take cognizance of any action, &c., in which the title to any corporeal or incorporeal hereditaments, &c., shall be in question. There is no similar provision in Act XI of 1865, and I find nothing to warrant me in holding that, where a suit is brought in a form in which it is cognizable by a Small Cause Court, the Court can decline jurisdiction if it appears that incidentally a question of title is raised which it has not jurisdiction to determine for any other purpose than the decision of the suit

before it. Notwithstanding such a question of title may be raised by the answer of the defendant, the suit was originally and continues to be of the nature cognizable by a Court of Small Causes, and when such a suit is brought in an ordinary Civil Court, the provisions of Section 586, Act X of 1877, apply, and preclude this Court from entertaining a second appeal.

[196] Inasmuch as the former rulings of this Court on the point raised in this appeal appear to me to be open to question, I would direct that the case be brought before a Full Bench.

Muttusami Ayyar, J.—I concur. This suit was brought by the appellant to recover damages, and, within the language of Section 6, Act XI of 1865, it was cognizable by a Court of Small Causes. Although such Court is not competent to decide a question of title to immovable property, when such decision is the direct and immediate object of the suit, it is bound to adjudicate upon it incidentally when it is necessary to do so for dealing with the object-matter of a suit over which it has jurisdiction. By Section 6, Act XI of 1865, suits for damages are generally declared to be cognizable by a Court of Small Causes, while suits in which a question of title to immovable property collaterally arises for decision are not excepted from its jurisdiction, as in 9 and 10 Vic., Cap. 95, Section 58. It is hardly necessary for me to add that such incidental determination by a Court of Small Causes is no bar to a suit having for its object the establishment of title to immovable property by a Court competent to deal with it. The Small Cause Court was not a Court of competent jurisdiction within the meaning of Section 13, Act X of 1877, and, if it dealt with a question of title, it did so for the limited purpose of dealing with the suit over which it had jurisdiction. The suit before us was, however, instituted in the Court of a District Munsif, which is not, like the Court of Small Causes, a Court of summary or limited jurisdiction; but the suit does not, in my judgment, cease on that ground to be in the nature of a suit cognizable by the Court of Small Causes within the meaning of Section 586 of the *Code of Civil Procedure*. It seems to me that the question has reference to the mode of adjudication and not to the *forum*. It is whether the adjudication was upon a question directly and substantially or only collaterally in issue, regard being had to the relief sought and the nature of the suit, and not whether the question was decided by a Court of competent or summary jurisdiction. If the matter adjudicated on in a suit is only incidentally in issue or cognizable, the adjudication is final, whether by a Court of concurrent or limited jurisdiction, only for the proper purpose and object of that suit. The rule applicable **[197]** in such cases is laid down in *Barrs* v. *Jackson* [1 Y. & C.C.C., 585 (Smith's L. C., Vol. 2, p. 807, 7th ed.], in the following terms: "However essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and" (the rule is) "that either may again litigate them for any other purpose as to which they may come in question; provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object."

For these reasons I would also dismiss this appeal.

Mr. *Wedderburn*: This suit is cognizable by a Small Cause Court (Act XI of 1865, Section 6*), for, if it was intended to exclude the jurisdiction of the

* [Sec. 6:—The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage, or

Suits cognizable by Small Cause Courts.

Court when a question of title to land arose, it is reasonable to suppose that the Act would have expressly provided, as in the *County Courts Act* (9 and 10 Vic., Cap. 95, Section 58) that such cases were excluded from the jurisdiction conferred. In other decisions of this Court (M. H. C. R., 1, 213; 2, 184; 5, 67) the test suggested is to see whether the question of title is raised *bona fide* or colorably. The last Full Bench decision in I. L. R., 2 *Cal.*, 470, is on all fours with this case and in my favour. The object of Section 586 of the *Civil Procedure Code* is evidently to limit the right of appeal in simple cases, and it makes no difference whether the suit is filed in a Small Cause Court or not. The nature of the case is the same. The test proposed in the *Madras* cases is not a satisfactory one, for the Court must hold an enquiry and virtually try the case before it can see whether the defence is *bona fide* or colorable. Such a proceeding could scarcely have been contemplated as a part of the procedure of a summary Court.

Balaji Rau for the Appellant.

The Full Bench (TURNER, C.J., INNES, KERNAN, and MUTTUSAMI AYYAR, JJ.) delivered the following **Judgments**:—

Innes, J.—The question for the Full Bench is whether, when a question of title is raised in a suit instituted in a Court of Small Causes, the jurisdiction of the Court of Small Causes is thereby ousted.

[198] It is difficult to understand how a suit, the claim in which is cognizable by a Court of Small Causes, can cease to be within the jurisdiction of the Court by reason merely of the issues raised by the defence.

No doubt, as in *Kumara Venkatachella Reddiar's* case (4 M. H. C. R., 393), the defence may disclose matter showing that the suit is only colorably a Small Cause suit, and that, under the guise of a suit of a nature cognizable by the Small Cause Court, the plaintiff is really seeking to establish a title; that case was a suit for rent by a landholder, who, at the date of the suit, had no contract with the defendant for the rent sought to be recovered. His real object in that suit was not to recover the rent, but to establish that defendant was bound to occupy upon the terms of paying a particular rate of rent. In that case the Court held that the Small Cause Court had no jurisdiction. But the *ratio decidendi* was that the suit was not what it professed to be, and that what it was really found to be was a suit on a claim of a nature not cognizable by a Small Cause Court.

The former decisions, in laying it down that when a question of title is *bonâ fide* raised the Small Cause Court ceases to have jurisdiction, appear to have meant no more than that the Small Cause Court should not proceed with a case when once it appeared that the substantial object of the suit was to try the title under cover of a Small Cause claim, because, when that was once

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Proviso. demand does not exceed in amount or value the sum of five hundred rupees, whether on balance of account or otherwise; provided that no action shall lie in any such Court—

(1) On a balance of partnership account, unless the balance shall have been struck by the parties or their agents.

(2) For a share or part of a share under an intestacy, or for a legacy or part of a legacy under a Will.

(3) For the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury.

(4) For any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer, unless, as regards arrears of rent for which such suit may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction over claims to such arrears.]

disclosed, it would be clear that it was a claim over which the Small Cause Court had originally possessed no jurisdiction.

The case before us affords a very fair illustration of the impossibility in some cases of avoiding an incidental decision on the title, though the suit may be a *bonâ fide* claim simply to damages.

The real difficulty in the way of determining that the title may be thus incidentally decided on arises out of the language of Section 13 of the *Civil Procedure Code*, which, it is contended, would make the decision in the Small Cause suit *res judicata*, and so debar the parties to the Small Cause suit from trying the title in another proceeding. But a matter once heard and determined by a tribunal is not *res judicata*, unless the matter was **[199]** directly and substantially in issue before it, and finally determined by it, the Court being a Court competent finally to determine such a question.

Now a question of title in a Small Cause suit, before the passing of the present *Civil Procedure Code*, would have been regarded as only incidentally in question. Explanation II of Section 13 appears to regard everything which might and ought to be made a ground of attack or defence as being directly and substantially in issue, and in this view, where the question of title is raised in a Small Cause suit, it is directly and substantially in issue if the question is one which it was material to the plaintiff or defendant to raise. It therefore remains to consider whether in such a case the Small Cause Court can be said to have finally decided the question and to have been a Court competent to decide it.

Now what the Small Cause Court decides is simply the question whether the debt, damage, or demand is due. To arrive at a decree upon the claim it may be necessary to determine collaterally the question of title, but there is no *decree* upon the title for the very sufficient reason that the Small Cause Court is not a Court competent to pass such a decree.

The decree is the only final decision, and it results that the incidental decision upon the title could not in any subsequent proceeding be *res judicata* under the language of the Civil Procedure Code. It is equally clear that, in a subsequent suit upon the title, this incidental decision would not be *res judicata* under the rules which guide the English Courts and which are taken from the Roman law. The *causa petendi* would not be the same.

I concur with the view taken by the Division Bench and would dismiss the appeal.

Kernan, J.—The preliminary point, whether a second appeal lay when the sum sued for was less than Rs. 500, is exactly the same that arises in *Mohesh Mahto* v. *Shaik Piru* (I. L. R., 2 Cal., 470). There the right to the trees felled depended on the plaintiff's title to the land, and the Court held that as the suit (for less than Rs. 500) was cognizable by the Lower Court, no special appeal lay, **[200]** though the question of title may have been incidentally raised in it.

Here the plaintiff's right to the trees is rested upon his title to the lands. In both cases it seems to me difficult to say that the question of title to the land is only incidentally raised. In both these cases the title to land has been raised and determined, and necessarily so, before the question of title to the trees could be decided. In the *Calcutta* case the decision on the question of title was in favour of the plaintiff. In this case it is in favour of the defendant. In each case the plaintiff alleged and gave evidence of title, and in each case the title was denied and proof was given in order to disprove plaintiff's title to the land.

The plaintiff in each case brought his action, assuming he had title to the land and therefore title to the trees. The object of each suit was not to establish title to the land, and so far only the title might be said to be incidentally in question. But when the title was denied, and proof given on each side to prove or disprove title, I feel much difficulty in seeing how the title could be said to be only incidentally in question, as it was the title to the land that was the foundation of the title to the trees.

I do not wish, however, to set my views against the decisions in many cases on the point, and therefore join in the judgment that there is no second appeal.

Turner, C. J.—I desire that the reasons which I recorded for referring this case be taken as the ground of my judgment for holding the second appeal cannot be maintained and should be dismissed, but, under the circumstances, without costs.

As to the course which should be pursued by a Small Cause Court or by a Court trying a suit of the nature cognizable by a Court of Small Causes, if it appears a *bona fide* question of title arises which the Court can in that suit determine only incidentally, the Court cannot, as I have said, decline jurisdiction, but it may properly grant a reasonable adjournment that the question may be litigated and determined by the proper tribunal.

Muttusami Ayyar, J.—I concur.

NOTES.

[I. JURISDICTION OF SMALL CAUSE COURT TO TRY QUESTIONS OF TITLE—

When in a case of Small Cause nature, question of title has to be incidentally raised and decided, Court should not refuse to exercise jurisdiction:—(1880) 15 Bom. 400; (1890) 17 Cal. 707.

II. DECISION OF SMALL CAUSE COURT, WHEN RESJUDICATA IN SUBSEQUENT SUITS.

When an issue which is essential for the decision though not essential for granting relief is decided by a Small Cause Court, it bars a subsequent suit involving the same issue between the same parties:—See for the above principle (1892) 2 M.L.J. 36; (1889) 13 Mad. 287 where the defence that plaintiff had no title to the land, which was raised in a previous suit for acceptance of patta and decided therein, was held could not be raised in a subsequent suit; and (1907) 30 Mad. 498.

See for an elaborate discussion of the above principle in the recent Full Bench Case of **(1912) 23 M.L.J. 543 F.B.]**