declaration would amount to a final decision of the question between the parties, if the party aggrieved did not take the course indicated by the institution of a suit to supersede it. In this view it is unnecessary for us to determine whether the Courts below were right in attributing to the statements in the claim and in the letter C the effect of admissions binding on the defendant, though we feel bound to say that we should have felt some difficulty in affirming their judgments on this issue. We must allow the appeal of the plaintiff and dismiss that of the defendant with costs.

NOTES.

[I. EFFECT OF ATTACHMENT.

In 4 Mad. 302, this Court held that the effect of the attachment was to create a charge. In view of the decision of the Privy Council in *Moti Lal* v. *Karrabuddin* (1898) 25 Cal. 179 that an attachment merely prevented alienation and did not give title, we think the Madras decision to which we have referred cannot be relied on. We do not think that the attachment gives the attaching creditor any higher right than to have the property kept in *custodis legis* pending the determination of his rights :— **(1909) 32 Mad. 429.** *See* also (1907) 30 Mad. 413, and the notes to (1879) 5 Cal. 148 P. C.

II. ESTOPPEL OF THE UNSUCCESSFUL INTERVENOR.

On this point *See* (1885) 8 Mad. 506 ; (1887) 10 Mad 357 ; (1897) 22 Bom. 640.]

[4 Mad. 308]

APPELLATE CIVIL.

The 7th and 12th March, 1881.

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Thyila Kandi Ummatha.....(Plaintiff), Appellant

and

Thyila Kandi Cheria Kunhamed.....(Third Defendant), Respondent.*

Res judicata—*Civil Procedure Code, section 13 (3).*

In 1878 plaintiff sued to recover certain land from defendant on the ground that she being the owner had made an oral lease of the land to the defendant in 1876.

Issues were framed both as to title, and as to the letting, but the Munsif, without trying the question of title, dismissed the suit on the ground that the oral lease was not proved.

Held that a fresh suit to recover possession of the land on the ground of title was not barred as being *res judicata*.

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* Second Appeal No. 738 of 1880 against the decree of J. W. Reid, District Judge of North Malabar, reversing the decree of E. K. Krishnan, District Munsif of Tellichery, dated 22nd July 1880.

[309] Explanation (3) of Section 13 of the Code of Civil Procedure refers to relief applied for which the Court is bound to grant with reference to the matters directly and substantially in issue.

Bheeka Lall v. *Bhuggoo Lall* (I. L. R., 3 Cal., 23) and *Denobhundoo Chowdry* v. *Kristomonee Dossee* (I. L. R., 2 Cal , 152) dissented from.

THE facts and arguments in this case appear sufficiently, for the purpose of this report, in the **Judgment** of the Court (INNES and MUTTUSAMI AYYAR, JJ.) which was delivered by INNES, J.

Mr. *Shephard* for Appellant.

Mr. *Wedderburn* for Respondent.

Innes, J.—The plaintiff sued to recover a paramba from first defendant. She said it had been given her by her Karnavan in 1049 (1874), and she had let it in 1876 to first defendant. She had sued to recover it in Suit 173 of 1878, alleging her title and the letting, but the Munsif had found the letting unproved and dismissed the suit.

The defendant denied the letting and said that the land had never been put in possession of the plaintiff, but had been given to him for his wife's Stridhanam in 1875, and that the suit was barred by the former suit.

The District Munsif found that the question of title had been deliberately avoided by the District Munsif who tried the first suit, and that that question was in consequence not *res judicata*. He also found that the property had been solemnly settled on plaintiff in 1874, and that the Karnavan, in subsequently purporting to convey it to first defendant, either had no title to convey as the property had already vested in plaintiff, or, if he still held it, was holding it in trust for plaintiff, and was not entitled to resettle it upon another. He gave a decree for plaintiff. The District Judge considered the case *res judicata*. We are unable to agree with him. Unless the matters directly and substantially in issue have been heard and determined, they are not *res judicata*. It has often been held that matters directly and substantially in issue have been heard and determined, although the judgment of the Court does not expressly allow or disallow them. In such a case the aggrieved party has his remedy in an appeal or an application for review ; but, if he acquiesces in the judgment, the matter so put in issue must be regarded as having been decided when the judgment becomes **[310]** final. In the case, however, now before us, we find that the party was allowed no option. The Munsif deliberately narrowed the question in issue to the question of whether there had been a letting or not. This was equivalent to striking out the issue as to title and leading the parties to suppose that that question might, if necessary, be the subject of another trial.

We are of opinion that the question of title cannot be said to have been heard and determined in the former suit in which though the question was originally in issue, the Judge excluded it from consideration and practically proceeded with the suit as though it was simply a suit to recover rent, on the footing that the relation of landlord and tenant subsisted between the parties.

We are referred to *Bheeka Lall* v. *Bhuggoo Lall*, (I. L. R., 3 Cal., 23), with the decision in which we cannot agree. It proceeds upon the view that when there had been a joint business and then a partition, and a suit was brought by one of the parties for an account of the joint business treating it erroneously as subsisting and the Court dismissed the suit, he was not afterwards entitled to sue for recovery of an amount which he was entitled to under the partition, and this because, as the Judges say, he was bound in the first suit to bring forward every

right. A plaintiff is only bound to include the whole of the claim which he is entitled to make in respect of the cause of action (Section 43, Civil Procedure Code).

The old Code was to the same effect. The same view which we are constrained to regard as erroneous pervades the decision in *Denobhundoo Chowdry* v. *Kristomonee Dossee* (I. L.R., 2 Cal., 152), in which we should have followed the opinion of GARTH, C.J. To apply this to the present case, in the former suit the obligation to pay rent and the non-payment of the rent due constituted the cause of action put forward, the title was an incidental question, (see *DeSouza* v. *Coles* (3 M. H. C. R., 384); *Jackson* v. *Spittal* [39 L. J. (N.S.), 321]; and *Durham* v. *Spence* [40 L. J. (N. S), 3]. In the present suit the title is the cause of action. Plaintiff, no doubt, in the former suit prayed for possession of the paramba, and that relief was refused, and it is argued that this brings the case within the terms of Explanation 3 of Section 13 of the Civil Procedure Code, and that, as that relief was not granted in the [311] former suit, it must be regarded as having been refused. That explanation, however, must be read with the section, and clearly applies to relief applied for which the Court is bound to grant with reference to the matters directly and substantially in issue. Now the *causa petendi* in the former suit was the existence of the relation of landlord and tenant and the omission to pay rent which entitled the plaintiff to recover the property. The title, no doubt, was in issue, but not directly and substantially, only incidentally, and that relief is now prayed for on wholly different grounds. We do not think that Explanation (3) of Section 13 bars the plaintiff from putting forward her present claim to relief. We shall therefore send the following issues for trial :—

(1) Has the plaintiff a title to the property sued for?

(2) Is first defendant liable for mesne profits, and what is the amount of them?

Upon return of the finding on the issues referred, the Court set aside the decree of the District Judge and restored the Munsif's decree in favour of the plaintiff.

NOTE.—For the meaning of the term Cause of action, *See* I. L. R., 1 Mad., 375, and the cases there cited.

[4 Mad. 311]

APPELLATE CIVIL.

The 27th September and 31st October, 1881.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Kupu Rau.....(Second Defendant), Petitioner

and

Venkataramayyar.....(Plaintiff), Respondent.*

Civil Procedure Code, Section 515—Arbitration—Umpire, extension of time for submission of award by—Estoppel.

As in the case of an arbitrator so in the case of an umpire a Court has power to extend the period within which the award is to be submitted.

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* C.M. P. No. 15 of 1881 against the order of P. Tirumal Rau, Acting Subordinate Judge of Tinnevelly, dated 7th December 1880.