There must, therefore, be a declaration that as between the parties the several tenants for life and their children, the tenants for life are each entitled to a charge on the remainder of the two-sixteenth limited to their children, but that the tenants for life must each bear during their respective lives the interest that accrues upon the sum charged on the two-sixteenth remainder. As regards the shape of the decree, the decree will therefore confirm the certificate and set out the terms of the certificate, converting the certificate into a decree in its several branches and with its several schedules. There will then be a recital in the decree that a sum of Rs. 3,000 mentioned in the certificate as due to the administrator of James William Ouchterlony has been paid to the administrator. Then the decree is to direct the receiver over five-sixteenths of the estate belonging to J. W. Ouchterlony and vesting in the plaintiff as executor shall continue until further orders. The decree will declare all parties to the suit entitled to their costs in the following manner. The trustees shall pay out of the funds the costs of the plaintiff when taxed and ascertained, and the costs of the trustees when taxed and ascertained, and also the costs of the several tenants for life and of the infants, after deducting from all such costs all sums of money due or paid heretofore on account thereof under the orders of this Court, dated 21st April 1886. Costs as between attorney and client. Liberty to all parties to apply.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

APPAYYA (PLAINTIFF), APPELLANT,

and

RAMIREDDI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1888. Apl. 20, 24.

Civil Procedure Code, s. 146—Failure of plaintiff to prove unnecessary averments—Decree on admission of defendant—Unnecessary issues raised by Court.

In a suit brought by an undivided member of a Hindu family to set aside a sale made by the managing member and to recover a moiety of the land sold, the plaintiff alleged that he had been adopted by his deceased uncle and claimed as adopted son. The purchaser denied the adoption, alleged that plaintiff was the natural brother of the vendor, and justified the sale under Hindu law.

* Second Appeal No. 1044 of 1887.

APPAYYA v. RAMIREDDI.

The lower Courts found that the adoption was not proved, and, on the plaintiff urging that if the adoption was not proved yet he was entitled to recover by virtue of the admission that he was the natural brother of the vendor, held that the latter claim was inconsistent with the claim as adopted son.

The suit was therefore dismissed:

Held, on appeal, that the suit was improperly dismissed, and that if the purchaser could not justify the sale the plaintiff was entitled to succeed.

The rule that the decree should be in accordance with what is alleged and proved, is intended to prevent surprise and is not applicable to a case in which the defendant's own admission is adopted as the ground of decision against him.

APPEAL from the decree of C. S. Crole, District Judge of North Arcot, confirming the decree of M. Jayaram Rau, District Munsif of Chittoor, in Suit 501 of 1885.

The facts are set out in the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

Mr. *Ramasami Raju* for appellant.

Narayana Rau for respondents.

JUDGMENT.—The plaintiff (appellant) is a minor, and, as his next friend, his uncle, instituted the present suit to set aside a sale of joint family property and to recover for the minor the moiety to which he would be entitled as a coparcener on partition. The plaint stated that the minor's father Surayya and one Appayya were cousins; that the property in dispute was joint; that Appayya adopted the minor; that defendant No. 2 (respondent) was his natural brother, and that he alienated the joint property without adequate necessity or justification in favor of defendant No. 1 (respondent). Defendant No. 2 admitted the claim and alleged that defendant No. 1 took advantage of his youth and improperly obtained a sale-deed from him. Defendant No. 1, who is the purchaser, resisted the claim. He denied that Appayya adopted the minor plaintiff, and that the property in suit was common both to Appayya and Surayya. He stated however that the plaintiff and defendant No. 2 were Surayya's sons as alleged; that the property in question belonged to Surayya, and that defendant No. 2 sold it to him in payment of a debt contracted by Surayya's widow for the benefit of the joint family. Upon the pleadings the coparcenary relation in regard to the property in suit and the minor's title to a half share were admitted, subject to the special case set up by defendant No. 1, viz., that there was a sale in his favor which bound the minor's interest. The District Munsif recorded three issues with reference to the question of title, viz., (1) whether

tne property in litigation was common to Appayya and Surayya, (2) whether Appayya adopted the appellant, and (3) whether the sale was for family benefit. He recorded, however, no issue as to whether if the sale were not valid, the plaintiff was entitled to the relief claimed by him on the admissions made by defendant No. 1. He decided the first two issues against the minor, and the third issue against the purchaser, and dismissed the suit with costs. In his judgment he referred to the plaintiff's contention that he was entitled to the relief prayed for on his natural admitted birthright, but overruled it on the ground that it was inconsistent with his alleged right as an adopted son. On appeal, the District Judge concurred with the District Munsif that the case set up in the plaint was not proved and confirmed the original decree. It is urged in second appeal that the plaintiff was entitled to a decree on the ground that the special case set up by defendant No. 1 was not proved, and that the plaintiff's title as a coparcener in respect of the property in question was admitted.

It seems to us that the contention is well founded. The plaintiff was entitled at the first hearing to adopt the admissions of defendant No. 1 as proof of his *primâ facie* title to the relief claimed and to put him to the proof of the special case set up by him. In dealing with questions of alleged variance between the ground of claim and the ground of decision, regard should be had more to the substance of the issue than to the form in which it is raised. The substantial issue in the case was whether the plaintiff was a coparcener at the time of sale with respect to the property in dispute, and, if so, whether the sale set up by defendant No. 1 was made for family benefit. Whether coparcenary was deduced from his *status* as the son of Surayya or as the adopted son of Surayya's cousin was not a matter necessary for the decision of this case. If the District Munsif had said that the plaintiff had a good *primâ facie* title in either view of his *status* and recorded an issue only with reference to the special case set up by defendant No. 1, it could not be contended in appeal that there were false averments in the plaint, and that though they were immaterial for the purpose of determining the claim to the relief prayed for, distinct issues ought to have been raised in order that the plaintiff may be punished in some way for making untrue statements. The fact of the District Munsif having recorded issues which were not necessary to see if the plaintiff had a *primâ facie* title, could make no

APPAYYA v. RAMIREDDI.

difference. It is, on this view, that when the plaintiff asserts one kanam and the defendant relies on a different kanam and the former claims a decree on the admitted kanam, a decree has been passed in his favor by this Court. Again, a decree has been passed in plaintiff's favor when the plaint avers a lease and jenm title and the former is not, and the latter is, alone established. If the plaint in this case stated that the plaintiff claimed either by reason of his *status* as Surayya's son by birth, or as Appayya's son by adoption, it could not be said as supposed by the District Munsif, that the plaintiff was not entitled to rely on such alternative ground of claim. Having regard to s. 146 of the Code of Civil Procedure, the absence of an express allusion to alternative averments in the plaint should not be permitted to prove fatal to the plaintiff's claim when the alternative is raised by the pleadings as a ground of decision. The rule that the decree should be in accordance with what is alleged and proved has for its object to prevent surprise and preclude the adoption, as a ground of decision, of what is not suggested by the pleadings and other materials on which issues may be framed and presumably not in the contemplation of the parties when they proceed to trial. There can be no surprise upon a party when his own admissions are adopted as the basis of a decision against him. If the course adopted by the District Munsif in this case misled defendant No. 1, and he thereby failed to prove his special case, an opportunity should be given him to prove it; but we do not think that the suit should be dismissed because the District Munsif raised issues which were unnecessary for the purpose of determining whether the plaintiff had a *primâ facie* title, and then refused to recognise the plaintiff's right to claim a decree on the admissions made by the defendant and on the finding that the latter failed to prove his special case.

We set aside the decree appealed against and direct that the appeal be re-heard with reference to the foregoing observations, and that leave be given to both parties to produce fresh evidence with reference to the third issue. We further direct that, under the circumstances, each party do bear his own costs of this appeal. The other costs will be provided for in the revised judgment.