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I would decree this appeal with costs, and, reversing the decree of the lower appellate Court, restore that of the Court of first instance.

But I wish to add that the Full Bench ruling of this Court in *Munia* v. *Puran* (1) which was referred to at the hearing, is clearly distinguishable from this case, because all that was ruled there was that a woman's *stridhan*, being property over which she had absolute control, her husband's relations have no reversionary interest in such property so as to be entitled to set aside any acts of transfer made by her during her lifetime. There is nothing in that case to warrant the conclusion that upon the death of a widow, when the question of devolution arises, her husband's relations would not be her heirs.

OLDFIELD, J.—I concur.

Appeal allowed.

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April 5.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

AMIR ZAMA (PLAINTIFF) *v.* NATHU MAL (DEFENDANT) *

Set-off—Res judicata—Civil Procedure Code, ss. 13,111—*Court-fee on set-off.*

In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant claimed a set-off as the price of cloth which he alleged the plaintiff had sold on his account on commission. It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off, as being due for the price of cloth sold and delivered by the defendant to him; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. The cloth now alleged to have been delivered on commission-sale was the same as that alleged in the former suit to have been actually sold to the plaintiff.

Held that the defendant was entitled, under s. 111 of the Civil Procedure Code, to set-off the amount claimed as due for goods sold on commission against the plaintiff's demand; and that the claim for such set-off was not barred under the provisions of s. 13.

Held also that the court-fee payable on the claim for set-off was the same as for a plaint in a suit.

* Reference No. 179 of 1886, under s. 617 of the Code of Civil Procedure, by W. R. Barry, Esq., Judge of the Court of Small Causes at Allahabad.

(1) I. L. R., 5 All. 310.

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THIS was a reference by Mr. W. R. Barry, Judge of the Allahabad Small Cause Court. The facts of the case and the points of law referred were stated by him as follows :—

"The defendant Nathu Mal, on the 13th November, 1885, brought a suit against the plaintiff Amir Zama, to recover a sum of Rs. 91-9-9, on the following allegation, namely, that from the 30th November, 1884, to the 16th May, 1885, the plaintiff (present defendant) sold to the defendant (present plaintiff) goods of the value of Rs. 441-7-3; that part of the said value was paid by the defendant and part of the said goods were returned, and that there remained a balance of Rs. 91-9-9 due from the defendant to plaintiff. At the hearing the defendant pleaded that he did not purchase the goods, but had received them to sell on behalf of the plaintiff on commission, and an issue was joined whether the goods were sold and delivered by plaintiff to defendant. The Court found on the facts that the goods were never sold to defendant as alleged by plaintiff, and the plaintiff's suit was dismissed.

"On the 3rd February, 1886, the defendant in the former suit brought a suit against the plaintiff in the former suit for wages, alleging that the defendant had engaged him to sell cloth on his behalf at a remuneration of Rs. 8 per mensem; that the plaintiff had served the defendant accordingly, but the remuneration had not been paid. At the hearing the defendant, among other matters, pleaded a set-off of Rs. 91-9-9 on the averment that he had intrusted certain goods to the plaintiff to be sold by him on behalf of the defendant on commission-sale; that the plaintiff had sold part of the goods and returned others; and that goods of the value of Rs. 91-9-9 had not been accounted for by the plaintiff. The defendant therefore claimed this sum as a set-off. It is admitted by the defendant that the goods which he now avers to have been made over to the plaintiff on commission-sale, are the same that he alleged to have been sold to plaintiff in the former suit. The claim in the former suit for the price of goods sold and delivered and that now made in the set-off, arise out of exactly the same group of facts; the only difference between the two claims is, that in the former the defendant (then plaintiff) alleged an out-and-out sale to the plaintiff (then defendant), while in the

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latter the defendant alleges that the goods were made over to the plaintiff on commission-sale. The set-off appears to satisfy the requirements of s. 111, Civil Procedure Code, in every respect except one, namely, that the money now claimed is legally recoverable by the defendant from the plaintiff, and on this point I entertain a reasonable doubt.

"The statement in the plaint of the 13th November, 1885, that the goods were sold and delivered to the defendant in that suit, is doubtless an admission which is relevant against the present defendant; but this admission is not conclusive proof of the matter admitted unless it operates as an estoppel (Evidence Act, s. 31). Now this admission does not amount to an estoppel under Chapter VIII of the Evidence Act, for the other party has not in any way acted on the admission, nor changed his position in consequence thereof. But the decree in the former suit may operate as *res judicata*, so as to make the claim now advanced inadmissible; or, in the language of the English text-books, the decree may operate as an estoppel by record. The arguments in favour of admitting the set-off appear to be briefly as follows:—

"In the former suit the question that was put in issue and determined was—Were the goods sold and delivered by plaintiff to defendant? There was no finding on the issue—Were the goods intrusted to the defendant to be sold on behalf of the plaintiff on commission-sale? This is the point that is in issue in the present suit, and there was no finding on this point in the former suit. The current of English decisions seem to favour the admissibility of the set-off, and the judgment of Lord Westbury in *Hunter* v. *Stewart* (1) is a strong authority on this side. The allegations and equity of the suit are different from the allegations and equity of the set-off: compare Broom's *Legal Maxims*, 2d ed., page 250:—'If, however, it be doubtful whether the second action is brought *pro eâdem causâ*, it is a proper test to consider whether the same evidence would sustain both actions, and what was the particular point or matter determined in the former action.'" It seems clear that the evidence given in the suit, which was directed to prove *sale* and delivery of the goods, would not sustain the claim made

(1) 31 L. J., Ch. 346.

in the set-off, *viz.*, that the goods were intrusted to the plaintiff for sale by him as a commission agent. And numerous other authorities might be adduced in support of this view.

"On the other side—*i.e.*, against the admissibility of the set-off, there are the terms of s. 13, *Explanation* II of the Code of Civil Procedure:—'Any matter which might or ought to have been made the ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit.' It may be urged that in the former suit the plaintiff should have brought forward his whole title and asserted the two claims in the alternative. A strong authority in support of this view is *Woomatara Debia* v. *Unnopoorna Dassee* (1) and *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (2). In the latter of these cases the judgment of Phear, J., seems to show clearly that their Lordships of the Privy Council have deliberately adopted a stricter view than that held by the Courts in England. This view is confirmed by a comparison of the terms of s. 2, Act VIII of 1859 with those of s. 13, Act XIV of 1882. The former section forbids a Civil Court from taking cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, and this section was in force when the judgments quoted above were passed by the Judicial Committee and the Calcutta High Court. The present section would seem to go further than the old section, and to enact as law the proposition affirmed by the Privy Council.

"It may be argued that these rulings were given in cases in which a plaintiff sought to establish a double title to the same property, and do not apply to a case like the present, where no title is in issue, and the claim is for money and not for possession of immoveable property; also that the frame of the first suit may be due to mistake or negligence on the part of the plaintiff's pleader, and that the plaintiff should not suffer for the pleader's mistake; and it may be replied that the principle affirmed in *Woomatara Debia* v. *Unnopoorna Dassee* (1) is general in its terms, and may well be held to govern cases where the claim is simply for money, and not to establish a title to property; and that if a plaintiff alle-

(1) 11 B. L. R. 158. (2) I. L. R., 2 Calc. 152.

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ges that he sold goods to a defendant when, in point of fact, he did not sell them, but merely intrusted the goods to him for sale on commission, the allegation is one altogether within the personal knowledge of the plaintiff, and it is not unreasonable that he should be precluded from suing on another and altogether different title for the same relief. My own opinion is that, according to the law in force in British India, the set-off of the defendant is inadmissible, because the sum of money claimed therein is not legally recoverable owing to the fact that the claim is *res judicata*. And I would respectfully ask for a decision as to whether, under the circumstances stated above, the suit bars the set-off.

"I would further ask for a decision on the following point:—What court-fee, if any, is payable on this set-off? I am of opinion that the set-off is chargeable with the same court-fee duty as if the claim made in the set-off had been made in a separate suit. S. 111, Civil Procedure Code, says:—'Such set-off shall have the same effect as a plaint in a cross-suit;' and if the set-off is to have the effect of a plaint, it seems reasonable that it should be stamped as a plaint under the provisions of s. 6, Act VII of 1870. On the other hand, the Court-Fees Act does not anywhere lay down that a set-off shall be chargeable with stamp duty. A set-off is treated in Chapter VIII of the Civil Procedure Code as of the same nature as a written statement, or even as part of a written statement: and it has been ruled [*Cherag Ali* v. *Kadir Mahomed* (1)] that no court-fee is payable on a written statement filed by a defendant at the first hearing. It has also been suggested at the Bar that the court-fee duty on the set-off cannot exceed the duty payable on the sum by which the set-off exceeds the claim. I am aware of no authority in support of this position, and, on the grounds of general principle, consider that since the set-off has the same effect as a plaint in a cross-suit, the set-off should pay the same court-fee duty as if it were a plaint. But as the Court-Fees Act prescribes no fee as payable on a set-off, I have reasonable doubts on the question, and respectfully ask for a decision thereon."

The parties did not appear.

OLDFIELD and BRODHURST, JJ.—The facts are these. The plaintiff Amir Zama has instituted this suit against the defendant

(1) 12 Calc. L. R. 367.

Nathu Mal to recover money due as wages, alleging that the defendant engaged him to sell cloth on his account at a fixed monthly salary.

It appears that the defendant has previously sued the plaintiff to recover Rs. 91 9-9 as due to him for the price of cloth sold and delivered by the defendant to the plaintiff. In that suit the plaintiff (then defendant) pleaded that there was no sale to him of any cloth, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. Now the defendant claims a set-off of Rs. 91-9-9 against the plaintiff's claim, on the ground that out of it Rs. 87-5-0 are due to him as the price of cloth which the plaintiff had sold on his account on commission, —the rest due for cloth which the plaintiff purchased. In our opinion, under the circumstances stated, the answers to the reference should be (i) that the defendant is entitled, under s. 111, Civil Procedure Code, to set-off this sum of Rs. 87-5-0 claimed as due for cloth sold on commission against the plaintiff's demand, as it is an ascertained sum claimed to be due with reference to the same contract under which the plaintiff's demand arises; (ii) that the claim for the set-off of Rs. 87-5-0 is not barred under the provisions of s. 13, Civil Procedure Code. The former suit was brought by the defendant for the price of goods sold and delivered by the defendant to the plaintiff, whereas the defendant's present claim is for money payable by the plaintiff to him for money received by the plaintiff for his (defendant's) use, and as the price of cloth belonging to defendant and sold on his account by plaintiff.

The two claims are founded on different titles, and the issue raised by the latter was not in issue in the former suit, and was not heard and decided. The set-off as to Rs. 4-4-0, price of cloth alleged to have been sold to plaintiff, is not entertainable. Our reply to the remaining question is, that the court-fee payable on the claim for set-off should be the same as for a plaint in a suit.