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to this alleged adoption. If the adoption had in fact taken place, Natthu Singh ceased to have any share in the interest of his natural father, Shib Singh; but, on the death of Shib Singh, Natthu Singh took an equal share in Shib Singh's property with his brothers and continued to cultivate the *sír* of Shib Singh. Another fact which goes against the adoption is that Musammat Lachcho up to the time of her death in 1891 continued to be not only recorded in respect of the one-fifth share, but actually cultivated it.

There is evidence on the record which we believe, which shows that Tarsi Ram died some years before Natthu Singh was born. Natthu Singh's case depends on his proving that the adoption alleged by him took place in Tarsi Ram's lifetime. Musammat Lachcho, as the widow of Tarsi Ram, was allowed by the family to be entered in the revenue papers in respect of the one-fifth share for her maintenance, though she was not entitled to be so entered. It is very possible that in 1876, owing to some ill-feeling amongst the members of the family she was disposed to put forward Natthu Singh as the adopted son of Tarsi Ram. Whatever was the cause of her line of conduct at that time, her subsequent conduct was inconsistent with any adoption having taken place. On these grounds we dismiss first appeal No. 93 of 1893, with costs.

Appeal dismissed.

Before Mr. Justice Knox and Mr. Justice Aikman.

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HAMIDA BIBI (PLAINTIFF) *v.* ALI HUSEN KHAN (DEFENDANT).*

Civil Procedure Code, ss. 366, 588—*Abatement of suit—Appeal.*

No appeal will lie from an order under the first paragraph of s. 366 of the Code of Civil Procedure declaring that a suit shall abate, such order neither amounting to a decree nor being specifically appealable under s. 588. *Bhikaji Ram Chandra* v. *Purshotam*, (1) dissented from.

THE facts of this case are as follows :—

The plaintiff sued in the Court of the Subordinate Judge of Sháhjahánpur to recover a sum of Rs. 41,686-10-8 as her dower

*First Appeal No. 123 of 1894, from an order of Rai Banwari Lal, Subordinate Judge of Sháhjahánpur, dated the 26th June 1894.

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debt, but died shortly after the filing of the suit, and before issues were framed, on the 14th of November 1893. After various adjournments for the purpose of allowing the heirs of the deceased plaintiff to come in, the case was fixed for the 15th of May 1894. On the 10th of January 1894, one Musammat Hamida Bibi, the mother of the plaintiff, applied to be brought on the record as legal representative of the plaintiff in respect of some of the property in suit, but that application was rejected, as it did not contain a schedule of the property, nor was it signed and verified. On the 29th of May 1894, Hamida Bibi again applied to be brought on to the record as a representative of the deceased plaintiff, but this application also was rejected as not being signed and verified, and also as being beyond time. Hamida Bibi accordingly appealed to the High Court.

Pandit *Moti Lal* and Babu *Durga Charan Banerji* for the appellant.

Mr. *Abdul Majid* and Maulvi *Ghulam Mujtaba*, for the respondent.

KNOX and AIKMAN, JJ.—A preliminary objection is raised by Mr. *Ghulam Mujtaba* to the hearing of this appeal, on the ground that the order appealed from is an order passed under the first paragraph of s. 366 of Code of Civil Procedure and that no appeal is provided for such order by s. 588 of the Code. Our attention was drawn in the course of the argument to the case of *Bhikaji Ramchandra* v. *Purshotam* (1) in which it was held that such an order is appeable. It was held by the learned Judge who decided that appeal that such an order was virtually "a decree within the meaning of s. 2 of Act No. XIV of 1882, as it disposes of the plaintiff's claim as completely as if a suit had been dismissed." The learned Judges who decided that appeal appear to have overlooked the very important provisions of s. 371, which allow a person claiming to be the legal representative of a deceased to apply for an order to set aside the order of abatement. It cannot therefore be said that an order under the first paragraph of s. 366 is an

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adjudication which, as far as the Court expressing it, decides the suit or appeal. Moreover, it is provided by clause (20) of s. 588 of the Code that an applicant whose application for an order to set aside an abatement is refused can appeal from such order of refusal. We sustain the objection and dismiss the appeal with costs.

Appeal dismissed.

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Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

SHIB CHARAN LAL (DEFENDANT) *v.* RAGHU NATH (PLAINTIFF).*

Civil Procedure Code, s. 13--*Res judicata—Finding in judgment not embodied in the decree and not essential to the making of the decree as framed—Act No. I of* 1887 (*Specific Relief Act*) *s.* 42.

A finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made, otherwise the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit.

The finding of fact to operate as *res judicata* need not have been the sole finding of fact upon which the decree was made, but it must have been a material and necessary finding of fact, material and necessary in the sense that the fact must have been found as it was found in the judgment, and could not have been found otherwise, for the decree as it was made to have been a good result in law from the fact or facts so found. Further, if there were two findings of fact, either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can operate as *res judicata*.

A matter cannot be said to be "directly and substantially in issue" within the meaning of the first paragraph of s. 13 of Act No. XIV of 1882 unless and until it is, or becomes, material for the decision of the suit to find as to it. The framing of issues under s. 146 of Act No. XIV of 1882, on which at that stage of the suit the right decision of the case appears to depend, does not of itself make the matter to which such issues relate "directly and substantially in issue" within the meaning of s. 13, although, when the finding upon any one or more of the issues is sufficient for the decision of the suit, it may be desirable that the Court should state in its judgment its finding or decision upon each separate issue which it had framed.

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* Appeal No. 44 of 1894 under s. 10 of the Letters Patent.