

not render the marriage void unless there was force or fraud. In this case it is admitted that there was no force, and we are unable to see how it can be urged that the marriage was celebrated by fraud. As we have said above, the learned Subordinate Judge has found that the father of the girl behaved badly towards his wife and daughter and treated them in a most unnatural manner; that for years he had deserted them, and that in consequence of his conduct they were living with the brother of the mother of the girl who supported and maintained both. The girl had attained a marriageable age, and the defendant, her father, had taken no steps to get her married. It was under such circumstances that the mother and her brother arranged with the plaintiff for the marriage of the girl with the plaintiff, took her to his house and there celebrated the marriage. We cannot hold under these circumstances that any fraud was committed. This appeal fails and is dismissed with costs.

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Appeal decreed.

Before Mr. Justice Knox and Mr. Justice Burkitt.

IMAM KHAN (PLAINTIFF) v. AYUB KHAN AND OTHERS (DEPENDANTS).
Civil Procedure Code section 13, Explanation II—Res judicata—Matter which might have been made ground of attack in a former suit.

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Where a plaintiff sued for possession of immovable property as owner, having no title as owner, but a possible title as mortgagee, it was held that he could not in a subsequent suit between the same parties for possession of the same property claim as mortgagee, inasmuch as his title as mortgagee might have formed an alternative ground of attack in the former suit. *Amolgh Ram v. Champa Lal* (1), *Mathura Prasad v. Sambhar Singh* (2), *Hasan Ali v. Siraj Husain* (3), *Atchayya v. Bangarayya* (4), and *Kameswar Pershad v. Rajkumari Rutun Koer* (5) referred to.

THE facts of this case are fully stated in the judgment of the Court.

* Second Appeal No. 213 of 1895 from a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 14th November 1894, confirming a decree of Maharaj Singh Mathur, Munsif of Haveli Aligarh, dated the 12th December 1893.

(1) Weekly Notes, 1891, p. 132.

(3) I. L. R. 16 All., 252.

(2) Weekly Notes, 1892, p. 224.

(4) I. L. R., 16 Mad., 117.

(5) I. L. R., 19 I. A., 234.

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Maulvi *Ghulam Mujtaba*, for the appellants.

Mr. *Abdul Raoof*, for the respondents.

KNOX and BURKITT, JJ.—The suit is concerned with two houses, which for brevity's sake we will call the North and South house. The North house belonged to one Muhammad Raza Khan, the South house to his wife, Hamid-un-nissa. Hamid-un-nissa died in 1875. Her husband, Muhammad Raza Khan, died in 1879, having in 1877 mortgaged both the houses with possession to one Sultan Khan. In 1885 the representatives of Musammat Hamid-un-nissa instituted a suit against the mortgagee Sultan Khan and against the representatives of Muhammad Raza Khan for their shares in the South house, and they got a decree in March, 1886, for 552 out of 624 silams. On an application for review by the mortgagee a compromise was arrived at between the mortgagee Sultan Khan and the representatives of Hamid-un-nissa, by which the latter were to have possession of both the houses on paying Rs. 65 to the mortgagee. The compromise apparently was made a rule of Court, the money was deposited in January 1886, and possession was given to the representatives of Hamid-un-nissa in 1890. Now the present suit has been instituted by Imam Khan, father of Musammat Hamid-un-nissa. He has impleaded the representatives of Muhammad Raza Khan and has asked for possession of both houses on the ground that he has been illegally ejected by the representatives of Muhammad Raza. The prayer of his suit is for possession of both houses as mortgagee or in the alternative for recovery of Rs. 93, the mortgage money. A decree has been passed in favour of the plaintiff for the South house. This appeal has reference to the North house only. The main defence set up by the representatives of Muhammad Raza is that the plaintiff's suit is barred under the second explanation to section 13 of the Code of Civil Procedure. They alleged that the claim now made might and ought to have been made in the former litigation between the parties. The facts of the former litigation are these:—In June, 1890, the representatives of

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Hamid-un-nissa sued the representatives of Muhammad Raza Khan for possession as absolute owners of the house. No hint of any other title being vested in the plaintiff was then made. The suit was dismissed in appeal in December, 1891, the plaintiff having failed to prove the absolute title set up. On these facts it is now contended that this suit is barred under section 13 of the Code of Civil Procedure. In our opinion this contention is correct. Following the case of *Amolak Ram v. Champal Lal* (1), the case of *Mathura Prasad v. Sambhar Singh* (2), the case of *Hasan Ali v. Siraj Husain* (3) and the case of *Atchayya v. Bangarayya* (4), we are of opinion that the claim in the alternative to hold as mortgagee not merely might, but ought to, have been added to the prayer in the former suit as a matter of attack on the defendant. On this question the judgment of their Lordships of the Privy Council in *Kameswar Pershad v. Rajkumari Ruttan Koer* (5) is instructive, and, adopting the rule therein laid down, we cannot say that a claim to possession under an absolute title and a claim to possession under a mortgage title are so dissimilar as to cause confusion. On a consideration of these authorities we have no hesitation in holding that the alternative claim to possession as mortgagee ought to have been made a matter of attack in the former suit, and as such was not done, this suit, as far as the North house is concerned, is in our opinion barred by the principle of *res judicata* laid down in explanation II, section 13 of the Code of Civil Procedure. We therefore dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes, 1891, p. 132.

(3) I. L. R., 16 All., 252.

(2) Weekly Notes, 1892, p. 224.

(4) I. L. R., 16 Mad., 117.

(5) L. R., 19 I. A., 234.